EDITOR'S NOTE

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{SHOW }

PROCEEDINGS AND ORDERS

DATE: 070886

CASE NBR 85-1-06648 CSY
SHORT TITLE Huffington, John N.
VERSUS Maryland

DOCKETED: Apr 4 1986

Date	Proceedings and Orders
Apr 4 1986	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Apr 28 1986	Order extending time to file response to petition until June 4, 1986.
Jun 4 1986	Brief of respondent Maryland in opposition filed.
Jun 11 1986	DISTRIBUTED. June 26, 1986
Jun 11 1986	REDISTRIBUTED. June 26, 1986
Jun 27 1986	REDISTRIBUTED. July 2, 1986
Jun 27 1986	REDISTRIBUTED. July 2, 1986
Jul 7 1986	The petition for a writ of certiorari is denied. Justice Brennan. dissenting: Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227 (1976), I would grant certiorari and vacate the death sentence

CONTINUE {

PROCEEDINGS AND ORDERS

DATE: 070886

CASE NBR 85-1-06648 CSY
SHORT TITLE Huffington, John N.
VERSUS Maryland

DOCKETED: Apr 4 1986

Date	Proceedings and Orders
Jul 7 1986	The petition for a writ of certiorari is denied. Justice Brennan, dissenting: Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case. Dissenting opinion by Justice Marshall. (Detached opinion.)

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EDITOR'S NOTE

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85-6348 (2)

Misc. No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOHN NORMAN HUFFINGTON,

Petitioner

v.

STATE OF MARYLAND,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

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MOPD

85-6648

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOHN NORMAN HUFFINGTON,

Petitioner,

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, John Norman Huffington, who is indigent and who has been found to meet the qualifications for representation by the Office of the Public Defender for the State of Maryland, asks leave to file the attached Petition for Writ of Certiorari to the Court of Appeals of Maryland without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Petitioner's affidavit in support of this Petition is attached hereto.

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Counsel for Petitioner

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Misc. No. **85-6648**

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOHN NORMAN HUFFINGTON,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, John Norman Huffington, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No

   (a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   N/A

   (b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

   March 1981 - $3.50/hour

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

   (a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

   Maryland State Penitentiary - "State Pay" 1.15/day

3. Do you own any cash or checking or savings account? No

   (a) If the answer is yes, state the total value of the items owned.

   N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? N/A - No

(a) If the answer is yes, describe the property and state its approximate value.

N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to my questions in this affidavit will subject me to penalties for perjury.

John Norman Huffington
JOHN NORMAN HUFFINGTON

Subscribed and sworn to before me, a Notary Public, this 27th day of March, 1986.

Carol A. Trombetta
NOTARY PUBLIC

My Commission Expires: 7/1/87

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

JUSTICE

85-6648

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOHN NORMAN HUFFINGTON,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

NOTICE OF APPEARANCE

MR. CLERK:

Please enter my appearance as counsel for Petitioner in the above captioned case.

George E. Burns, Jr./MRS

GEORGE E. BURNS, JR.
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Officer of the Public Defender
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Counsel for Petitioner

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2. Did the trial court's exclusion from evidence of the transcript of the testimony of an unavailable witness deny Petitioner the rights to due process and compulsory process?

3. Were Petitioner's Fifth Amendment rights violated where the indictment failed to contain all of the material elements of the offense upon which he was convicted?

MISC. NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOHN NORMAN HUFFINGTON,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

John Norman Huffington, Petitioner, requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered on November 13, 1985, in John Norman Huffington v. State of Maryland, Nos. 64 and 133, September Term, 1985.

OPINION BELOW

The opinion of the Court of Appeals of Maryland, affirming the conviction and death sentence of Petitioner,

is included as Appendix A. It is reported at ___ Md. ___, ___ A.2d ___ (1985).

JURISDICTION

The opinion of the Court of Appeals of Maryland affirming the sentence of death was filed on November 13, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULE

The following are set forth in the Appendix:

CONSTITUTIONAL PROVISIONS

United States Constitution
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STATUTES

Maryland Code, Article 27, Sections 412, 413 and 414 (1982 and 1984 Supp.)

RULE

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STATEMENT OF THE CASE

Petitioner was charged by indictment with, inter alia, two counts of capital murder. On October 31 through November 19, 1983, Petitioner was tried by the Circuit Court for Frederick County, Maryland, and was convicted of two counts of murder, breaking and entering, and handgun offenses; additional charges were resolved by merger or acquittal. A sentencing proceeding was conducted by the

court and a jury on April 30 through May 1, 1984. Petitioner was sentenced to death on each murder charge, and to incarceration for 18 years on the lesser counts.

Pursuant to Md. Code (1957, 1982 Repl. Vol.) Art. 27, §414, the conviction and sentence were reviewed by the Court of Appeals of Maryland. On November 13, 1985, that Court, three judges dissenting, affirmed the judgments of the trial court. The reported (official) opinion of the Court of appeals is attached as an Appendix hereto.

At trial, Deno Constantine Kanaras testified that on May 24, 1981, he arrived at Petitioner's apartment for the purpose of obtaining cocaine. Petitioner had none and was unable to obtain any, and the two decided to go to a local bar called Pecora's to have a drink. At 12:30 a.m. on May 25, they left for a nightclub called the Club Golden Forty. Joseph Hudson, one of the ultimate victims, was employed as a disc jockey at that establishment. Hudson was present both in his professional capacity and to celebrate the birthdays of a friend, Michael Perez, and his girlfriend, the second ultimate victim, Diane Becker.

Upon arriving at the Golden Forty, Petitioner agreed with Hudson that he would purchase cocaine from Hudson at the trailer shared by Hudson and Becker in the Long Bar Harbor campground in Harford County, Maryland.

At 2:00 a.m., Petitioner, Kanaras, Hudson and Becker all left the nightclub and drove to the trailer. Once inside the trailer, Petitioner paid Hudson $275.00 for three

and one-half grams of cocaine. At that point, all concerned had ingested various quantities of cocaine and marijuana.

After completing the transaction, Petitioner and Kanaras returned to Petitioner's apartment and ingested more cocaine. Petitioner then began making telephone calls in an effort to find a buyer for additional cocaine retained by Hudson. Petitioner ostensibly found a buyer, and had Kanaras drive him back to Hudson's trailer. Arriving between 3:30 and 4:00 a.m., they picked up Hudson and drove him to the rural Wheel Road area of Harford County. According to Kanaras, after the three men exited the car Petitioner shot and killed Hudson and removed a quantity of cocaine from the latter's pocket.

Petitioner then turned the gun on Kanaras, forcing him to drive back to the Hudson trailer for the purpose of stealing money. Once inside the trailer, Petitioner killed Diane Becker by striking her on the head with a vodka bottle and then stabbing her some 33 times with a knife. Under duress, Kanaras then helped Petitioner steal a large amount of cash and Becker's purse, which contained narcotics and paraphernalia.

Kanaras' testimony continued that for the next several hours he remained with Petitioner, helping him to dispose of evidence and to establish an alibi by attending a local "fiddler's convention." Kanaras remained with Petitioner and refrained from informing anyone of the

killings even after the disposal of the gun and knife used in the homicides because he remained "scared" of Petitioner.

After the police learned of Kanaras' involvement in the case, he led officers to the areas where the evidence had been disposed of. Among the items recovered was a vodka bottle from which the police recovered a stain of human blood and a fingerprint matching Petitioner's. Additionally, hairs found on Diane Becker's clothing were found to microscopically match known samples of Petitioner's hair.

Notwithstanding his claim of duress, Kanaras was convicted by the Circuit Court for Kent County of the felony-murder of Diane Becker, theft, and housebreaking. In requesting that Kanaras be called as a court's witness in the present trial, the State asserted its belief that Kanaras was in fact a willing participant in the murders, and did not credit his version that he participated under duress.

On cross-examination, Kanaras denied that he had ever told one Stephen Rassa that he intended to kill Hudson and if necessary would kill Becker also. The defense then offered the transcript of Rassa's testimony as a prosecution witness at the Kanaras trial, proffering that diligent efforts to locate Rassa had failed. The trial court denied the motion, reasoning that prior recorded testimony can only be offered against a party which has had an opportunity to cross-examine the witness in question, and the State could not cross-examine Rassa because he was a State's witness.

Moving for a new trial, the defense pressed the issue again, proffering that Rassa had testified that he "had to stop Mr. Kanaras from killing the two individuals who are the subject of this particular proceeding."

The transcript reflects Rassa's testimony that on May 20, 1981, he and Kanaras were together for the purpose of selling jewelry and purchasing drugs. After Rassa had raised the idea of robbing Hudson, Kanaras (who, according to Rassa, had had substantial drug dealings with Hudson in Petitioner's absence and still owed him money) stated that "he wouldn't mind robbing Hudson and killing him." As Rassa and Kanaras approached Hudson's trailer for the purpose of purchasing cocaine, Kanaras decided to enter the trailer first armed with a gun, and then armed with a knife. Rassa was convinced at this point that Kanaras intended to rob and kill Hudson, and was forced to dissuade him from carrying the weapons into the trailer.[1]

REASONS FOR GRANTING THE WRIT

I. THE MARYLAND DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

A. Review of the decision below will guide state appellate courts in ascertaining to what extent and under what the Eighth and Fourteenth Amendments permit judicial reconstruction of capital sentencing statutes.

The Maryland capital sentencing statute, Md. Code (1957, 1982 Repl. Vol.), Art. 27, §§412-415, was enacted in

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[1]These events occurred five days before Hudson and Becker were actually killed.

1978. Under the statute, the sentencing authority must first determine whether one or more statutorily prescribed circumstances exist beyond a reasonable doubt. If no aggravating circumstances are found, the sentence shall be life imprisonment. §413(f). If one or more aggravating circumstances are found, the sentencing authority must then determine whether any mitigating circumstances exist by a preponderance of the evidence. §413(g). If both aggravating and mitigating circumstances are found, the sentencing authority must weigh the circumstances against each other. With respect to the balancing process, the statute provides:

> "Weighing mitigating and aggravating circumstances. - (1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.
>
> (2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.
>
> (3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life. §413(h).

Pursuant to §413(1) of the statute, the Maryland Court of Appeals adopted rules of procedure to govern sentencing proceedings, including a standard form verdict sheet. Md. Rule 4-343. If the balancing process is reached, the verdict sheet requires the sentencing authority to respond "Yes" or "No" to the statement:

> "Based on the evidence, we unanimously find that it has been proven by a PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked "yes" in section II outweigh the aggravating circumstances marked "yes" in section I." (Apx.).

If the section is "completed and marked 'no,' enter 'Death.'" Id.

Tichnell v. State, 287 Md. 695, 415 A.2d 830 (1980) was the first capital case under the new statute to reach the Maryland Court of Appeals. The Court reversed the sentence on the basis of a prejudicial remark by the trial judge. Id. 287 Md. at 743-45. Nevertheless, the Court addressed, in dicta, various aspects of the new statute including its burdens of proof. Noting that the statute does not expressly allocate the burdens of proof among the parties, the Court explained that, as a practical matter, "the State bears both the risk of nonproduction and nonpersuasion" with respect to proving the existence of aggravating circumstances while "the accused [bears] the risk of nonproduction and nonpersuasion" with respect to proving mitigating circumstances. The Court concluded:

> "Finally, if the sentencing authority finds, by a preponderance of the evidence, that the mitigating circumstances do not outweigh the aggravating circumstances, the death penalty must be imposed. §413(h)(2). Because the State is attempting to establish that the imposition of the death penalty is an appropriate sentence, the statute places the risk of nonpersuasion on the prosecution with respect to whether the aggravating factors outweigh the mitigating factors." Id. at 730.

The conclusion that the State bears the risk of nonpersuasion with respect to proving that aggravating circumstances outweigh mitigating circumstances was puzzling in several respects. First, it appears to conflict with the plain language of both the statute and the court rule. See Stebbing v. Maryland, 105 S.Ct. 276, 280-281 (&) n.6 (1984) (Marshall, J., dissenting from denial of cert.); Evans v. State, 304 Md. 487, 542-43, 499 A.2d 1261 (1985) (McAuliffe, J., dissenting). It also conflicts with the interpretation of the Maryland statute of the Chief Legislative Officer in the only piece of legislative history to accompany the statute, T.J. Peddicord, Memorandum to the General Assembly on Capital Punishment--Senate Bill 374 and House Bill 604 (Dec. 14, 1977). The Peddicord Memorandum provides:

> "Subsection (H) of §413 requires the court or jury to weigh the aggravating and mitigating factors, assuming that some mitigation has been found to exist. If it finds that mitigation does not outweigh aggravation, the sentence shall be death. (H)(2). If it finds that mitigation does outweigh aggravation, the sentence shall be life imprisonment. (H)(3)." Id. at 36.

Finally, the use of the preponderance of the evidence standard in the balancing process strongly suggests that the legislature intended to impose the risk of nonpersuasion on the defendant. See generally Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975).

The confusion generated by Tichnell was addressed directly by both parties in their briefs to the Court of Appeals in Johnson v. State, 292 Md. 405, 439 A.2d 542 1982). The appellant quoted from the Court's decision in Tichnell.

> "Because the State is attempting to establish that the imposition of the death penalty is an appropriate sentence, the statute places the risk of nonpersuasion on the prosecution with respect to whether the aggravating circumstances outweigh the mitigating factors. [287 Md.] at 849."

Appellant then asserted, "While Appellant agrees that the statute should place the burden on the state, it plainly does not." Brief for Appellant at 11-12. Accord, Brief for Appellant at App. 14, Thomas v. State, 301 Md. 294, 483 A.2d 6 (1984); Brief for Appellant at 54-55, Stebbing v. State, 299 Md. 331, 473 A.2d 903 (1984). The State responded in Johnson, supra:

> "It is possible ... that this Court [in Tichnell] misperceived the law as Appellant suggests and that the statute merely indicates that, in the weighing process, the judge or jury must employ a preponderance of the evidence standard concluding either that the mitigating circumstances do or do not outweight [sic] the aggravating circumstances, and does not clearly state the result if that balance is somehow in equipose.

Brief for Appellant at 9.

The decision of the Court of Appeals in Johnson appeared to settle the confusion generated by Tichnell. The decision did not refer to the language in Tichnell that placed the burden of persuasion with respect to §413(h) on

the prosecution, but, instead, quoted from that part of Tichnell that placed the risk of nonpersuasion on the defendant. "'If the mitigating circumstances do not outweigh the aggravating circumstances by a preponderance of the evidence, ... then a sentence of death must be imposed.'" Johnson, supra, 292 Md. at 438; see id. at 440 ("It may be that the jurors actually considered [the mitigating circumstance] but did not feel that it outweighed the aggravating factors present in the case.") See also Thomas v. State, supra, 301 Md. at 234 (the sentencer "found that appellant's family background and demographic characteristics constituted mitigating factors under § 413(g)(8) but concluded that they did not outweigh the statutory aggravating factor."); Stebbing v. State, supra, 299 Md. at 374 ("the evidence supports the trial court's finding that the aggravating circumstances is not outweighed by the mitigating circumstance"). See generally Note, "Tichnell v. State --Maryland's Death Penalty: The Need for Reform," 42 Md. L. Rev. 875 (1983).

After Johnson, the Maryland Public Defender's Office, representing the vast majority of death row inmates before the Court of Appeals, consistently argued that the double burden imposed on defendants by the statute to prove both the exitence of mitigating circumstances and that they outweigh the aggravating circumstances is unconstitutional. See, e.g., Brief for Appellant at 83-86, Booth v. State, No. 151, September Term, 1984, (Md. argued Jan., 1986); Brief

for Appellant at 91-97, Reed v. State, 305 Md. 9, 501 A.2d 436 (1985); Brief for Appellant at 107-112, Johnson v. State, 303 Md. 487, 495 A.2d 1 (1985); Brief for Appellant at 59-64, Maziarz v. State, 302 Md. 1, 485 A.2d 245 (1984). While refusing to respond directly to the argument, the Court of Appeals continued to use language indicating that the burden was on the accused to prove that mitigating circumstances outweigh aggravating circumstances. See Johnson v. State, supra, 303 Md. at 537 ("In the panel's opinion, the mitigating factor did not outweigh the aggravating factor"); Maziarz v. State, supra, 302 Md. at 6 ("the Maryland death penalty statute requires that a sentence of life imprisonment be imposed if, by a preponderance of the evidence, the sentencer finds that the mitigating circumstances outweigh the aggravating circumstances"). See also Colvin v. State, 299 Md. 88, 122, 472 A.2d 953 (1984) ("'A sentence of death may be invoked only if the mitigating circumstances do not outweigh the aggravating circumstances.'"); Tichnell v. State, 297 Md. 432, 449, 468 A.2d 1 (1983) ("We .... conclude that the aggravating circumstances are not outweighed by the mitigating circumstances"). But see Trimble v. State, 300 Md. 387, 415 n.16, 478 A.2d 1143 (1984) ("In Tichnell I, we also construed §413(h)(2), which provides that the trier of fact shall determine whether 'the mitigating circumstances outweigh the aggravating circumstance,' to place the burden of persuasion on the prosecution.").

Petitioner raised in her appeal the same standard form constitutional attack against the statute's double burden of proof raised in prior appeals to the Maryland Court. The Court responded, "Again we need not decide whether a statute imposing such a 'burden' on a defendant would be constitutional for the Maryland statute, as interpreted in Tichnell I and later cases, places no such burden on the defendant." 304 Md. at 476-77. But see Stebbing v. Maryland, supra, 105 S.Ct. at 280-281 (&) n.6 (Marshall, S., dissenting from denial of cert.); Evans v. State, supra, 304 Md. at 556 n.5 (McAuliffe, J., dissenting).[2] Addressing the

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[2] Judge McAuliffe responded to the Foster majority:

> The majority in Foster concedes there may have been some 'misunderstanding' of the statute as "authoritatively interpreted" in Tichnell v. State, 287 Md. 695, 720-37, 415 A.2d 830 (1980) (Tichnell I) and Calhoun v. State, 297 Md. 563, 635-38, 468 A.2d 45 (1983). I find the single statement made in Tichnell I, 287 md. at 730, 415 A.2d 830, inadequate in the context of that case and in the context of the capital cases decided thereafter by this Court to effectively convey the import of the interpretation today clearly announced by the Court in Foster. The "authoritative interpretation" of Calhoun consists of nothing more than a repetition of the statement made in Johnson v. State, 292 Md. 405, 439 A.2d 542 (1982), that the argument was "thoroughly considered and rejected" in Tichnell I. The frequency with which defense counsel have argued since Tichnell I that the statute improperly places the burden of ultimate persuasion upon the defendant, and the failure of experienced and able defense counsel to argue for an instruction to the opposite effect upon the authority of Tichnell I suggests to me that the 'interpretation' announced by Foster must be ranked among the best kept secrets in this State. All counsel and the learned trial judge in the instant case were understandably led to believe that the burden was

issue of legislative intent, the Court stated:

> With regard to the burden of proof, merely because the General Assembly as §413(h) referred in paragraph (2) to whether "mitigating circumstances do not outweigh the aggravating circumstances" and in paragraph (3) to whether "mitigating circumstances outweigh the aggravating circumstances," instead of using the reverse order or some other phraseology, does not reflect a legislative intent to place any burden or risk upon the accused. If the Legislature had added a fourth paragraph to subsection (h), specifying the result if the sentencing authority found that mitigating and aggravating circumstances were in a state of even balance or if the sentencing authority was unable to determine which outweighed the other, there would have been a clear inference regarding the allocation of the burden or risk. But the legislature added no such fourth paragraph. Instead, the Legislature in §413(h) merely directed the sentencing authority to engage in a weighing or balancing process, without indicating which side has the burden of proof. The Legislature contemplated in §413(h) that the sentencing authority would simply evaluate the aggravating circumstances which the prosecution had established beyond a reasonable doubt, and evaluate the mitigating circumstances which it found to exist, and determine which outweighed the other. 304 Md. at 477-78.[3]

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upon the defendant by the language of our capital cases subsequent to Tichnell I, as well, of course, by the language of the statute.

[3]If the order of listing aggravating and mitigating circumstances is irrelevant, one is left only to wonder why the Court of Appeals, since Foster, has switched from discussing whether the "mitigating circumstances outweighed the aggravating circumstances" to considering whether "the aggravating circumstances outweighed the mitigating circumstances. See Evans v. State, supra, 304 Md. at 539; Foster v. State, supra, 304 Md. at 483.

But see Evans v. State, supra, 304 Md. at 542-43 (McAuliffe, J., dissenting). The Court of Appeals thus rejected Petitioner's constitutional challenge to the statute and affirmed her death sentence.[4]

Although it generally is the province of the state courts to "interpret, and where they see fit, to reinterpret" their own constitutions and statutes, Gardner v. Louisiana, 368 U.S. 157, 169 (1961), limitations are imposed on judicial reconstruction by the due process clause. A court may not use its interpretive authority as an "'obvious subterfuge to evade consideration of a federal issue.'" Mullaney v. Wilbur, supra, 421 U.S. at 696, n.11. The decision in the instant case is "an obvious attempt to avoid the constitutional implication of forcing a defendant to shoulder the burden of persuading the sentencing authority that he should not be put to death." Evans v. State, supra, 304 Md. at 545 (McAuliffe, J., dissenting).

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[4]The Court denied Petitioner's Motion for Reconsideration. Petitioner sought reconsideration of the constitutionality of the Court's reconstruction and initial consideration, in light of the Foster decision, of whether the trial court erred in refusing a proposed jury instruction that would have placed on the State the burden to prove the ultimate propriety of the death sentence. The Court denied that Foster reconstrued the Maryland statute. ___ Md. ___ at ___. The Court found that the jury instruction issue was waived because it was not presented as such in Petitioner's appeal and that, in any event, the trial court did not err in refusing the instruction because the last sentence was "[a]t the very least, ... confusing." Id. at .

Assuming that Petitioner's constitutional attack was meritorious, the Court's strainedconstruction on appeal does not eliminate the unconstitutionality of Petitioner's sentence. "[W]here an accused is tried under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained an appeal by a limiting construction which eliminates the unconstitutional features of Act ...." Ashton v. Kentucky, 384 U.S. 195, 198 (1966). The same principle applies to sentencing statutes. See Hicks v. Oklahoma, 447 U.S. 343, 346-47 (1980).

Reconstruction may render a criminal statute unduly vague with respect to those persons convicted prior to the reconstruction.

> "If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' ...or to 'guess at the statute's meaning and differ as to its application,' .. the violation is that much greater when, because the uncertainty as to the statutes's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question."

Bouie v. City of Columbia, 378 U.S. 347, 352 (1964). The Maryland capital sentencing statute plainly failed to apprise "trial judges, jurors and attorneys throughout th[e] State" of the standard of proof to be applied. Evans v. State, supra, 304 Md. at 542 (McAuliffe, J., dissenting). See also Stebbing v. Maryland, supra, 105 S.Ct. at 280 n.11 ("The jury or court is left on its own to guess at the

burden of proof on the ultimate question.") (Marshall, J., dissenting from denial of cert.). Although the vagueness "might be cured for the future by [the] authoritative judicial gloss,'" of the Court of Appeals, it is not cured as to Petitioner whose sentence was imposed without adequate guidance. Bouie v. City of Columbia, supra, 378 U.S. at 353.

Finally, a court may not reconstruct a capital sentencing statute so as to render the imposition of the death penalty on some persons arbitrary and capricious. A statute which permits some persons to be sentenced to death while the lives of other persons in identical circumstances are spared clearly permits the imposition of death in an arbitrary and capricious manner. See Gregg v. Georgia, supra, 428 U.S. at 188 (death penalty may not be imposed where there is "no basis for distinguishing the few cases in which it is imposed from the many cases in which it is not") (quoting from Furman v. Georgia, 408 U.S. 238, 313 (1972) (opinion of White, J.)); Gregg v. Georgia, supra, 428 U.S. at 188 ("death sentences are cruel and unusual in the same way that being struck by lightening is cruel and unusual [where] of all the people convicted of capital crimes, many just as reprehensible as these, the petitioners [are] among a capriciously selected random handful upon whom the sentence of death has been imposed.'") (quoting Furman, supra, 408 U.S. at 390 (opinion of Stewart, J.)). Switching the burden of proof after several people, including Petitioner,

have been sentenced to death, creates a distinct possibility that identically situated people will be treated differently.

Assuming that reconstruction is permissible under the circumstances of a given case, the question arises whether and to what extent must the reconstruction be given retroactive effect. See Ivan v. City of New York, 407 U.S. 203, 205 (1972); Williams v. United States, 401 U.S. 646, 651-654 (1971). Had the Maryland Court of Appeals acknowledged that it was reconstructing the sentencing statute because, as written and construed, the statute was unconstitutional, precedent suggests that Petitioner would have to have been afforded the retroactive effect of the ruling. See Ivan v. City of New York, supra, 407 U.S. at 205; State v. Evans, 278 Md. 197, 210, 362 A.2d 629 (1975).

As constitutional principles and policies are evolving in the capital sentencing area, state appellate courts increasingly are engaged in active construction of the statutes both to preserve the constitutionality of the statute and to promote certain desired policies.[5] Guidance

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[5] For example, the Florida death penalty statute directs the sentencer to determine whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. Ann. §921.141(2)(b) and (3)(6) (1985). In State v. Dixon, 283 So.1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), the Florida Supreme Court explained: "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more mitigating circumstances ...." More recently, however, in response to a claim that a jury instruction impermissibly shifted the burden to the defendant to prove the impropriety of the death penalty, the Court stated: "[T]he jury

by this court is necessary to resolve due process issues raised by such appellate activism. Guidance will promote the correct and orderly disposition of cases by the state courts. It will also promote honesty in the judicial decision-making process. If courts know the bounds and requirements of judicial reconstruction, there will be less need to resort to device and denial as the Maryland Court of Appeals has done in the instant case.

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instruction, if given alone, may have conflicted with the principles of law enunciated in Mullaney and Dixon. A careful reading of the transcript, however, reveals that the burden of proof never shifted." Arango v. State, 411 So.2d 172, 174 (Fla. 1982).

The North Carolina statute requires the sentencer to determine "whether any sufficient mitigating circumstances or circumstances exist ... which outweigh the aggravating circumstance or circumstances found to exist." N.C. Gen. Stat. §15A-2000(b)(2) (1983). In State v. McDougall, 308 N.C. 1, 301 S.E.2d 308, 327 (1983) the North Carolina Supreme Court, setting forth the "order and form of the issues to be submitted to the jury," placed the burden onthe State to prove beyond a reasonable doubt the ultimate propriety of the death sentence.

The New Mexico statute simply instructs the sentencer to weigh the aggravating factors against the mitigating factors. N.M. Stat. Ann. §31-20A-2.B (1978). In State v. Gilbert, 100 N.M. 392, 671 P.2d 640, 650 (1983), the New Mexico Supreme Court held that under the statute, "the burden of proof and the burden of final persuasion rest squarely upon the State."

The Utah statute instructs the sentencer to consider mitigating and aggravating circumstances. Utah Code Ann. §76-3-207 (Supp. 1985). The Utah Supreme Court has interpreted the statute to require the state to prove that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt. See State v. Wood, supra 648 P.2d 71, 82-85 (Utah) cert. denied, 459 U.S. 988 (1982).

B. Review of the decision below will resolve important and recurring questions concerning the allocation and standard of proof in capital sentencing cases.

In Addington v. Texas, 441 U.S. 418, 423 (1979), this Court explained:

> "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact-finding, is to 'instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the vitigants and to indicate the relative importance attached to the ultimate decision.

This Court has repeatedly stressed the need for reliability in the capital punishment context.

> "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability on the determination that death is the appropriate punishment in a specific case."

Woodson v. North Carolina, 428 U.S. 280, 305 (1976). These principles would appear to preclude placing the burden on the defendant to prove the "ultimate question" of the propriety or impropriety of the death penalty. See Stebbing v. Maryland, supra, 105 S.Ct. at 280 n.11 (Marshall, J., dissenting from denial of cert.). See also White v. Maryland, 105 S.Ct. 1779 (Marshall & Brennan, JJ., dissenting from denial of cert.); Evans v. State, supra, 304 Md. at 550-553 (McAuliffe, J., dissenting); Note, supra, 42 Md. L. Rev. 875.

The Maryland statute now has been reconstrued to place the burden of proving the ultimate question on the State. This does not dispose of Petitioner's claim, however, because the statute was otherwise interpreted and applied at the time Petitioner was sentenced. See Ashton v. Kentucky, supra, 384 U.S. at 198; Hicks v. Oklahoma, supra, 447 U.S. at 346-47. Despite the construction of the Court of Appeals "that black is white," Evans v. State, supra, 304 Md. at 558 (McAuliffe, J., dissenting), the burden was squarely placed on Petitioner to prove that mitigating circumstances outweighed aggravating circumstances in her case. See id. at 557-58. Twenty persons in addition to Petitioner, have been sentenced to die in Maryland without the benefit of the Foster reconstruction. At least seven other states, by statute or judicial construction, also require the accused to prove that mitigating circumstances outweigh aggravating circumstances.[6] The question whether the State may require a criminal defendant to prove the

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[6] The seven states are: Arizona, see Ariz. Rev. Stat. Ann. §13-703(E) (1978) (construed in State v. Watson, 120 Ariz. 441, 586 P.2d 1253, 1258-59 (1978), cert. denied, 440 U.S. 924 (1979)); Colorado, see Colo. Rev. Stat. Ann. §16-11-103(2)(a)(II) (Supp. 1985); Missouri, see Mo. Ann. Stat. §565.030.4(3) §46-18-305 (1985); Nevada, see Nev. Rev. Stat. §200.030.4(a) (1985); Oklahoma, see 21 Okla. Stat. Ann. §701.11 (1983); and Wyoming, Wyo. Stat. §6-2-102 (d)(i)(B) (1983).

ultimate impropriety of the death sentence is one that has never been addressed by this Court. It affects many defendants in several states and warrants this Court's review.

The Maryland statute, like statutes in several states, does not require proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances.[7] This issue, which has never been addressed directly by this Court, is the sourse of disagreement and confusion in the lower courts. See, e.g., Ford v. Strickland, 696 F.2d 804, 817-19 (11th Cir.), cert. denied, 464 U.S. 865 (1983); id. at 877-883 (Anderson & Clark, JJ., dissenting); Evans v. State, supra, 304 Md. at 550-553

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[7] Among the states in which the death penalty statute has been authoritatively construed not to require proof beyond a reasonable doubt are: California, see People v. Frierson, 25 Cal.3d 142, 158 Cal. Rep. 281, 599 P.2d 587, 609-610 (1979); Idaho, see State v. Sivak, 105 Idaho 900, 647 P.2d 396, 401 (1983), cert. denied, 104 S.Ct. 3591 (1984); Illinois, see People v. Garcia, 97 Ill.2d 58, 454 N.E.2d 274, 282-83, 73 Ill. Dec. 414 (1983), cert. denied, 104 S.Ct. 3555 (1984); Missouri, see State v. Boulder, 635 S.W.2d 673, 684 (Mo. 1982), cert. denied, 459 U.S. 1137 (1983); New Mexico, see State v. Finnell, 101 N.M. 732, 688 P.2d 769, 772-773 (1984); and Pennsylvania, see Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937, 963 (1982), cert. denied, 461 U.S. 970 (1983).

At least six states require proof beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances. These states are: Arkansas, see Ark. Stat. Ann. §41-1302(b) (1977 Repl. Vol.); Massachusetts, see Mass. Gen. Laws Ann. ch. 279, §68 (Supp. 1985); North Carolina, see State v. McDougall, supra, 301 S.E.2d at 327; Ohio, see Ohio Rev. Stat. Ann. §2929.03(D)(1) (1982); Utah, see State v. Wood, supra, 648 P.2d at 83-84; and Washington, see Wash. Rev. Code Ann. §10.95.060(4) (Supp. 1986). In addition, Texas and Virginia do not use a balancing approach but require proof of all circumstances beyond a reasonable doubt. See Tex. Code Crim. Pro. Art. 37.071(c) (Supp. 1986); Va. Code §9.2-264.4 (1983 Repl. Vol.).

(McAuliffe, J., dissenting); Tichnell v. State, supra, 287 Md. at 732-34; See generally Smith v. North Carolina, 459 U.S. 1056 (1982) (Stevens, J., respecting the denial of cert.); State v. Wood, supra, 648 P.2d at 80-85; Comment, "Capital Punishment and the Burden of Proof: The Sentencing Decision," 17 Cal. W.L. Rev. 316 (1981).

Finally, the Maryland statute is unique in prescribing a preponderance of the evidence standard with respect to the balancing process. This is a different question than whether the reasonable doubt standard is constitutionally compelled. The usual rationale for not requiring proof beyond a reasonable doubt in the balancing process is that it is not a fact-finding process and, thus, does not lend itself to a rigid standard of proof. See, e.g., Ford v. Strickland, supra, 696 F.2d at 817-19. Maryland, however, has tried to create a balancing process that resembles a rigid fact-finding process and has assigned a standard of proof that "by its very terms demands consideration of the quantity, rather than the quality, of the evidence ...." Santosky v. Kramer, 455 U.S. 745, 764 (1982). Even if proof beyond a reasonable doubt is not constitutionally compelled in the death sentencing process, it does not follow that the constitution permits the Maryland scheme, under which a death penalty is mandated when the sentencer is convinced that, "as likely as not," Mullaney v. Wilbur, supra, 421 U.S. at 703, the sentence is appropriate.

See generally Note, supra, 42 Md. L. Rev. 875.

II. THE TRIAL COURT'S EXCLUSION OF EVIDENCE OF THE TRANSCRIPT OF THE TESTIMONY OF AN UNAVAILABLE WITNESS DENIED PETITIONER THE RIGHT TO DUE PROCESS AND COMPULSORY PROCESS.

It is well established that the due process guarantee secures to a criminal defendant the right to have the testimony of witnesses on his behalf. As this Court wrote in Washington v. Texas, 388 U.S. 14, 19 (1967):

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

See also Chambers v. Mississippi, 410 U.S. 284, 302 (1973), where the Court wrote that "Few rights are more fundamental than that of an accused to present witnesses in his own defense."

The instant case presents this Court with a novel issue: Does the constitutional right to call a "witness" encompass the prior recorded testimony of a person who is no longer available to appear in court?

Petitioner asserts that this question must be answered in the affirmative. It is now a clearly established principle in the law of evidence that prior recorded testimony is a complete equivalent of the live testimony of a witness where adequate safeguards, principally the presence of an oath and an opportunity for cross-examination, have been provided. See generally McCormick on Evidence, §254 at 761 (3rd Ed. 1984); Fed. R. Evid. 804.

This Court's cases dealing with prior recorded testimony have been in complete accord with this viewpoint -- the statement is admissible so long as adequate indicia of reliability are present. Compare California v. Green, 399 U.S. 149 (1970) (recorded testimony from preliminary hearing admissible) with Pointer v. Texas, 380 U.S. 400 (1965) (prior recorded testimony inadmissible, because the defense was not afforded an opportunity to cross-examine).

In the instant case, the prior testimony was vital to the defense of a capital defendant, because it implicated the State's principal witness as the person who both was the actual perpetrator of the murders, and who lied with respect to Petitioner's participation. The reliability of that statement, in the Green/Pointer sense, was provided by the fact that the person who made the statement was a prosecution witness at the initial proceeding. As various commentators have pointed out, a party who had an opportunity to conduct direct examination of a witness is hardly in a position to protest when that testimony is offered against

him in a subsequent case involving the same issues. 5 Wigmore, Evidence §1389 at 105 (3d ed. 1940); See also Falknor, "Former Testimony and the Uniform Rules: A Comment," 38 N.Y.U. L.Rev. 651 n.1 (1963). Moreover, under Maryland law the prosecution by calling that witness vouched for his credibility. Poole v. State, 290 Md. 114, 118-19 (1981).

In sum, prior recorded testimony has been afforded the same status as the live testimony of a witness. No principled distinction exists between the two for purposes of the right of a criminal defendant to adduce evidence in response to the allegations against him. In the instant case, the exclusion of the evidence effectively deprived Petitioner of that right. The judgment must accordingly be reviewed and reversed.

III. PETITIONER'S FIFTH-AMENDMENT RIGHTS WERE VIOLATED BECAUSE HE WAS CONVICTED ON THE BASIS OF AN INDICTMENT THAT DID NOT CONTAIN ALL OF THE NECESSARY ELEMENTS OF THE OFFENSE CHARGED.

This Court has recently reaffirmed that the Fifth Amendment right to be charged by a grand jury indictment contemplates that "the elements of the offense that sustain the conviction are fully and clearly set out in the indictment,... ." United States v. Miller, ___ U.S. ___, 37 Cr.L. 3001, 3003 (1985). In the present case, Petitioner was

convicted and sentenced to death on the basis of an indictment which failed to set forth the essential elements of the offense. Accordingly, review and reversal are in order.

The Maryland General Assembly has recognized two forms of first-degree murder: Wilfull, deliberate and premeditated murder on the one hand, and a killing occurring in the course of certain enumerated felonies on the other. See generally Robinson v. State, 293 Md. 193, 468 A.2d 328 (1983). Petitioner was charged with premeditated murder, in the following language:

> The Jurors of the State of Maryland, for the body of Harford County, do on their oath present that JOHN NORMAN HUFFINGTON, late of said County, on or about the 25th day of May, 1981, in the County aforesaid, unlawfully, willfully, and of deliberately premediated [sic] malice aforethought did kill and murder Diane Becker, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State, (Murder, First Degree, Art. 27, Secs. 407, 410, 412, 413, 616.)[8]

At Petitioner's first trial, he was convicted of felony-murder and acquitted of premeditated murder. His conviction was reversed by the Court of Appeals of Maryland, Huffington v. State, 295 Md. 1, 452 A.2d 1211 (1982). When Petitioner was retried, the State was restricted to only the felony-murder theory, and upon that theory a verdict of guilty was returned.

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[8]Petitioner was charged in identical terms with the murder of a second victim as well.

Quite obviously, the indictment failed to state the material elements of the offense. Felony-murder contains, as necessary elements, the commission of an underlying felony and a causal connection between that felony and the victim's death. These elements were not contained in the indictment. Accordingly, the charging document was constitutionally defective.

Petitioner's contention has been accepted by the Court of Appeals for the Sixth Circuit. In Watson v. Jago, 558 F.2d 330 (6th Cir. 1977), the court dealt with Ohio's substantive law of murder. Although premeditated murder and felony murder were included within the same paragraph of Ohio's first-degree murder statute, that State's Supreme Court deemed them to have different elements and to constitute separate offenses. Id. at 334-35, citing State v. Furguson, 195 N.E.2d 794 (Ohio 1964). The court held that the federal constitution does not permit conviction on a felony murder theory where only premeditated murder is charged. Id. at 338.

The indictment charging Petitioner clearly and specifically recited the elements of premeditated murder. Key elements of felony murder were omitted. Accordingly, Petitioner's conviction of the latter offense cannot stand.

Respectfully submitted,

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3/31/86

APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

NOS. 64 and 133

SEPTEMBER TERM, 1984

JOHN NORMAN HUFFINGTON

v.

STATE OF MARYLAND

Murphy, C.J.
Smith
Eldridge
Cole
Rodowsky
Couch
McAuliffe,

JJ.

Opinion by Smith, J.
Eldridge, Cole and McAuliffe, JJ.
dissent

Filed: November 13, 1985

We shall affirm the conviction and sentence of John Norman Huffington in this, his third trip to this Court, the second after a death sentence. His first trip was reported in Huffington v. State, 295 Md. 1, 452 A.2d 1211 (1982), where we reversed and remanded for a new trial. Upon the remand after that reversal the case was removed to the Circuit Court for Frederick County for trial. In Huffington v. State, 302 Md. 184, 486 A.2d 200 (1985), we rejected his contention that to again try him would place him in double jeopardy. After our per curiam order in that case (but before the filing of the opinion) Huffington was tried in the Circuit Court for Frederick County. A jury convicted him of two counts of first degree murder, breaking and entering, and handgun offenses. The same jury sentenced him to death for each murder. The case reaches us under the provisions of Maryland Code (1957, 1982 Repl. Vol.) Art. 27, § 414 providing for automatic review by this Court whenever the death penalty is imposed.

The facts surrounding the incident leading to Huffington's conviction are fully set forth in our earlier opinion. We shall here set forth only such facts as are necessary to a clear understanding of each of the issues presented by

Huffington in his appeal. We shall consider his contentions seriatim.

i. Refusal to admit the testimony given by Rassa at the trial of Kanaras

Deno Kanaras was the alleged accomplice of Huffington in the incidents here in question. Kanaras was convicted by a Kent County jury of felony murder, theft, and daytime housebreaking. See Kanaras v. State, 54 Md. App. 568, 460 A.2d 61, cert. denied, 297 Md. 109 (1983). At Kanaras' trial Stephen Rassa testified in rebuttal as a State's witness. Prior to that rebuttal testimony Kanaras had testified that he had been free from drugs for some time before the homicides in question. The purport of Rassa's testimony was that a few days before the incident in question Kanaras was still involved with drugs. Rassa told of a visit made by him and Kanaras to the homicide victims for the purpose of purchasing cocaine. At Kanaras' trial Rassa testified that Kanaras "said he wouldn't mind robbing Joe Hudson and killing him." Rassa said that five days before Hudson and Becker, the victims in the case at bar, were actually killed, when Rassa and Kanaras approached Hudson's trailer for the purpose of purchasing cocaine, Kanaras entered first armed with a gun and with a knife.

After laying a foundation of unsuccessful attempts to subpoena Rassa as a witness, Huffington offered the record

of Rassa's testimony at the Kanaras trial in Kent County. He sought its admission as prior evidence to establish that Kanaras might have killed the victims in the case at bar. The trial judge denied admission, stating:

> "The whole thrust of the cases in this area is that the right of cross-examination be fully afforded, and if it has not been afforded, then it is not only a violation of Article 21 of the Maryland Constitution but also before [sic] the amendment to the United States Constitution. It's clear from the proffered testimony in this case, and I find as a fact, that in the trial in which the Rassa transcript is sought to be used, Mr. Rassa was the State's witness, and accordingly, to grant your motion I would be depriving the State of its right to cross-examine fully Mr. Rassa in this case, which is a different case from the present case. The case in which the transcript is from, as I understand it, is the State v. Kanaras rather than the State v. Huffington, and so the situation is entirely different from the situation which caused me to grant the State's motion in connection with the Bognani testimony. Accordingly, the motion is denied."

There is no dispute here on the issue of Rassa's availability as a witness.

The rule applicable to prior testimony was set forth for the Court by Chief Judge Murphy in Crawford v. State, 282 Md. 210, 383 A.2d 1097 (1978):

> "Our predecessors have consistently held that testimony taken at a former trial may as a general rule be admitted at a subsequent trial where it is satisfactorily shown that the witness is unavailable to testify. Contee v. State, 229 Md. 486, 184 A.2d 823 (1962); Bryant v. State, 207 Md. 565, 115 A.2d 502 (1955); Hendrix v. State, 200 Md. 380, 90 A.2d 186 (1952). These cases generally recognize that where an opportunity was afforded to the accused to cross-examine the witness at the

> former trial, there is no violation of the state or federal constitutional right of confrontation. The rule has generally been applied without distinction between the admissibility of testimony given at a former trial and testimony given at a preliminary hearing since, as Professor McCormick states:
>
> > 'If the accepted requirements of the administration of the oath, adequate opportunity to cross-examine on substantially the same issue, and present unavailability of the witness, are satisfied then the character of the tribunal and the form of the proceedings are immaterial, and the former testimony should be received....' McCormick, Evidence § 258 (2d ed. 1972).
>
> Other text writers are in accord. See 2 Jones on Evidence § 9.22 (6th ed. 1972); 3 Wharton's Criminal Evidence § 650 (13th ed. 1973.)" 282 Md. at 214-15, 383 A.2d at 1100.

The rule was recognized ninety years ago in a criminal context by the Supreme Court. See Mattox v. United States, 156 U.S. 237, 15 S. Ct. 337, 39 L. Ed. 409 (1895). The Court discussed such testimony in the context of a claim that admission of testimony would violate the constitutional provision relative to confrontation of witnesses:

> "The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason

for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." 156 U.S. at 242-43, 15 S. Ct. at 339-40, 39 L. Ed. at 411.

On the issue in question see Annot., 15 A.L.R. 495 (1921), and the supplements thereto, 79 A.L.R. 1392 (1932), 122 A.L.R. 425 (1939), and 159 A.L.R. 1240 (1945). Obviously, as pointed out in 15 A.L.R. at 559, there can be no constitutional objection to admission of evidence on behalf of an accused in a criminal proceeding. The further observation is made that in admitting testimony on behalf of an accused courts generally have followed the rules which they have adopted with respect to permitting or rejecting testimony in favor of the prosecution.

On the problem at hand E. Cleary, McCormick's Handbook of the Law of Evidence, § 254 (3d ed. 1984) states:

> "Usually called 'former testimony', this evidence may be classified, depending upon the precise formulation of the rule against hearsay, as an

> exception to the hearsay prohibition on the one hand, or as a class of evidence where the requirements of the hearsay rule are complied with, on the other. The former view is accepted generally by the courts, rules, and textwriters, the latter was espoused by Wigmore." Id. at 759-60.

On cross-examination McCormick states in § 255:

> "More important, and more often drawn in question, is the requirement that the party against whom the former testimony is now offered, or a party in like interest, must have had a reasonable opportunity to cross-examine. Actual cross-examination, of course, is not essential, if the opportunity was afforded and waived. The opportunity must have been such as to render the conduct of the cross-examination or the decision not to cross-examine meaningful in the light of the circumstances which prevail when the former testimony is offered." Id. at 761-62.

McCormick also mentions another frequent issue in § 256, that of identity of parties:

> "[T]he natural next step is to recognize, as progressive courts have done, that neither identity of parties nor privity between parties is essential. These are merely means to an end. Consequently, if it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party. Identity of interest in the sense of motive, rather than technical identity of cause of action or title, is the test." Id. at 765.

The importance of cross-examination is explained by Martin, The Former-Testimony Exception in the Proposed Federal Rules of Evidence, 57 Iowa L. Rev. 547 (1972):

> "Given the faith which the Anglo-American adversary system places in the efficacy of cross-examination, it is not surprising that the most

> important feature of the former-testimony exception is that which requires such testimony to have been given in a situation where an opportunity existed to utilize that truth-testing device. The former-testimony exception to the hearsay rule is unique in this respect, as no other exception makes cross-examination a requirement for admissibility, and it is not usually discussed in connection with evidence admitted under other exceptions. It was this opportunity to cross-examine which led Wigmore to characterize former testimony as unobjectionable under the hearsay rule, rather than as admissible as one of its exceptions. In order to ensure the reliability of former testimony, the proposed Federal Rules retain the requirement that the opponent be given the opportunity to develop the testimony by cross-examination." Id. at 553-54.

Professor Martin says, "[The] crucial question is whether, given that the opponent can not now cross-examine the witness, the examination on the prior occasion was fairly equivalent to cross-examination in the present situation." Id. at 556.

Fed. R. Evid. 804(b)(1) states:

> "(b) Hearsay exceptions.--The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony.--Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

The issue of cross-examination is discussed in J. Weinstein & M. Berger, 1 Weinstein's Evidence ¶ 804(b)(1)[02]:

> "The prime guaranty of reliability in the case of prior testimony or depositions resides in their having been subjected to cross-examination prior to the present trial. When this condition and the requirement of an oath are met, the character of the tribunal before which the former trial was held is immaterial. 'If the tribunal was empowered to compel cross-examination, or did in fact compel cross-examination, the prior testimony should be admissible.' Similarly in the case of depositions, the condition of cross-examination is satisfied if the deposition is taken 'before an officer authorized by law to take depositions and empowered to compel cross-examination.' If the opportunity to cross-examine was lacking the prior testimony must be excluded. Even should it be determined that the tribunal conducting the original hearing lacked jurisdiction, admission of the prior testimony should depend on 'whether the sworn statements of the witness, now dead or unavailable, about the facts of which he had knowledge, were made under such circumstances of opportunity and motive for cross-examination as to make them sufficiently trustworthy to be used in the effort to ascertain the truth.'
>
> "Actual cross-examination is not required, 'but merely an opportunity to exercise the right to cross-examine if desired.' Representation by the same counsel at both trials is not required. If the party against whom the previous statement is now offered is the party against whom the testimony was previously offered, it is usually compatible with fair practice to make him bear the consequences of any deficiencies in the cross-examination or decision not to exercise that right. But situations may arise where because of particular circumstances, the existence of an opportunity to cross-examine would not have resulted in any testing of the reliability of the previous statement, where the conduct of the cross-examination or the decision not to cross-examine is not

'meaningful in the light of the circumstances which prevail when the former testimony is offered.'" Id. 804-74 to -76. (Emphasis in original.)

The case relied upon by the State that is closest to the factual situation before the Court is Commonwealth v. Meech, 380 Mass. 490, 403 N.E.2d 1174 (1980). There the defendant attempted to introduce at his trial testimony given by a witness for the prosecution before the grand jury. The court said:

> "The common model for the exception is one where the prior testimony was given by a person, now unavailable, in a proceeding addressed to substantially the same issues as in the current proceeding, with reasonable opportunity and similar motivation on the prior occasion for cross-examination of the declarant by the party against whom the testimony is now being offered....
>
> "The usual formula would not be fulfilled if grand jury testimony were subsequently offered against the indicted defendant, for he would not have had a chance to cross-examine. See United States v. Fiore, 443 F.2d 112, 115 & n. 3 (2d Cir. 1971), cert. denied, 410 U.S. 984 (1973). Nor is it nominally fulfilled where, as here, the defendant offers the testimony against the Commonwealth, for the Commonwealth was not in the position of a cross-examiner at the grand jury hearing; rather it was presenting the testimony through direct examination. However, it has been recommended by commentators, and on occasion held by courts, that a party's having tendered the testimony on direct should serve as the equivalent for the present purpose of his having cross-examined upon it. There is some support for this view as to grand jury testimony on the theory, perhaps, that the government should be considered bound to the trustworthiness of the evidence it chose to present to the grand jury as a basis for an accusation of crime. (See, however, note 12 infra.)

> "But even if the proposition were accepted that the defendant might in some circumstances use the grand jury testimony of a now unavailable witness at trial, McDonald's testimony would still be of dubious acceptability. For it is an important ground of this hearsay 'exception' that there be substantial identity between the issues at the earlier and later proceedings -- this to ensure 'that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented.' Where this similarity is absent, the testimony will not be fortified in the material respect -- that is, in its relation to the particular proposition sought to be proved in the later proceeding. See United States v. Wingate, 520 F.2d 309, 316 (2d Cir. 1975); State v. Augustine, 252 La. 983, 999 (1968). The problem is encountered here. The Commonwealth's purpose in examining McDonald before the grand jury was not to inquire into the defendant's criminal responsibility; it was to provide eyewitness proof about the defendant's possession of the supposed murder weapon in the vicinity of the crime near the time of death." 380 Mass. at 494-96, 403 N.E.2d at 1177-78.

United State v. Atkins, 618 F.2d 366 (5th Cir. 1980), is instructive. The court there said:

> "Admission of Inglet's testimony, given during government cross-examination of him in a December 19, 1978, James [1] hearing, also was not erroneously denied. Fed. R. Evid. 804(b)(1) permits admission of former testimony if the declarant is unavailable at trial and 'if the party against whom the testimony is now offered ... had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.' The defendant sought to use Inglet's testimony that his source of cocaine in Miami was a man named Robert, whose last name he

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1. "James" refers to United States v. James, 590 F.2d 575 (5th Cir. 1979) (en banc) pertaining to the introduction of co-conspirators' statements.

> did not know, in order to establish that Inglet was dealing with someone other than Robert Atkins, whose name was known to Inglet. Defense counsel for Atkins did not participate in the James hearing, and the hearing did not concern Atkins but only some of his codefendants. In addition, the government did not contend that Atkins was the Miami supplier being discussed by Inglet in the James hearing but rather that he was the contact man. Thus, the government did not have the motivation to question Inglet in order to make him acknowledge that the Robert of whom he spoke in the James hearing was in fact Atkins. Accordingly, Inglet's former testimony did not meet the requirements of 804(b)(1) for admission, and his challenge to its exclusion by the judge is without merit. See, e.g., Peterson v. United States, 344 F.2d 419, 425 (5th Cir. 1965)." 618 F.2d at 373.

We find Atkins persuasive. It follows along with the authorities we have heretofore quoted. When the State presented the testimony of Rassa at Kanaras' trial it was in a different context and for a different purpose from that for which Huffington desires to offer it in the case at bar.[2] The motivation on the part of the State for question-

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2. We take cognizance of the fact that the dissent differs with our view as to the purpose for which the Rassa testimony was offered at the trial of Kanaras. We point out that in Kanaras v. State, 54 Md. App. 568, 460 A.2d 61, cert. denied, 297 Md. 109 (1983), Judge Alpert said for the Court of Special Appeals:

> "In the instant appeal, the rebuttal testimony clearly explained and replied to the evidence which had been offered by the appellant in his defense. Kanaras had agreed to the accuracy of the language of the statement which he had given Saneman, which included the response that 'I never sold drugs. I always bought them.' Thus, the State was entitled to prove that Kanaras had been involved in drug transactions as a seller. Judge Rasin correctly observed that the central matter at issue in the case was drugs. When the defendant asserted that he was not a drug dealer, the State was entitled to rebut this evidence." 54 Md. App. at 594, 460 A.2d at 75-76.

ing Rassa was entirely different at that trial from the motivation the State would have had to question Rassa on cross-examination at Huffington's trial had Rassa been present as a live witness to offer the testimony sought to be introduced. Much has been written on the importance of cross-examination. In the words of the federal rule the party against whom the testimony is now offered did not have at the time of Kanaras' trial a similar motive in developing the testimony of Rassa. Given the wide discretion which trial judges have in admitting evidence, we find no error on the part of the trial judge.

ii. Mitigating factor of not being the sole proximate cause of the victim's death

Code (1957, 1982 Repl. Vol.) Art. 27, § 413(g)(6) provides that a mitigating factor which a sentencing authority may find to exist is that the act of the defendant was not the sole proximate cause of the victim's death. Huffington contends that because his cohort, Kanaras, was convicted of felony murder in the death of Becker (one of the individuals found to have been murdered by Huffington), then

Huffington is entitled as a matter of law to an instruction in his favor on this mitigating factor.

There is both a short and a somewhat longer answer to Huffington's contention. The short answer is that at no time did he request such an instruction. Not having requested such an instruction, the point is deemed waived. Maryland Rule 885.

A somewhat longer answer is that the sentencing authority, in this instance the jury, would be expected to return its finding based upon the evidence adduced before it. Evidence of Kanaras' conviction was not adduced. Had it been, the finding made by the jury at Kanaras' trial would not be binding upon the jury at Huffington's trial because it would not be based upon the same evidence.

The real answer is that contained in Evans v. State, Md. , A.2d (1985), [Nos. 66 and 98, September Term, 1984, decided Nov.12,1985] where Judge Eldridge said for the Court:

> "[W]e conclude that the General Assembly intended the words 'proximate cause' to apply only to direct physical causes of the victim's death, and not to acts of a principal in the second degree or an accessory before the fact which aided or abetted the act directly causing death." Md. at , A.2d at .

Footnote 16 of that opinion provides further clarification:

> "The type of situation which the Legislature likely had in mind by the language of § 413(g)(6) is illustrated by the following. If the perpetrator inflicts a serious wound under circumstances that would justify a conviction for murder if death should ensue, and death does ensue partly by reason of negligent medical treatment or refusal of the victim to accept medically recommended care, the perpetrator will not be excused from liability for the murder. See DeVaughn v. State, 232 Md. 447, 194 A.2d 109 (1963), cert. denied, 376 U.S. 927, 84 S.Ct. 693, 11 L.Ed.2d 623 (1964). Nevertheless, in a capital punishment case there would exist as a mitigating factor an additional proximate cause of death.
>
> "We need not in this case, however, explore the range or scope of acts which might fall within the language of § 413(g)(6). We go no further than our holding that the act of a principal in the second degree or accessory before the fact is not what the Legislature had in mind." Md. at , A.2d at .

Huffington simply was not entitled to such an instruction.

iii. The presentence investigation report

Code (1957, 1982 Repl. Vol., 1984 Cum. Supp.) Art. 41, § 124(d), adopted by Ch. 297 of the Acts of 1983 and effective July 1, 1983, provides:

> "In any case in which the death penalty is requested under Article 27, § 412, a presentence investigation, including a victim impact statement, shall be completed by the Division of Parole and Probation, and shall be considered by the court or jury before whom the separate sentencing proceeding is conducted under Article 27, § 413."

Code (1957, 1982 Repl. Vol.) Art. 27, § 413(c)(1)(iv) states that evidence admissible in a capital sentencing proceeding includes "[a]ny presentence investigation report."

Huffington contends that the trial court erred in admitting two portions of the presentence investigation report. The first concerns that portion of institutional history pertaining to infractions not leading to criminal prosecutions committed while Huffington was incarcerated prior to trial. The second pertains to the admission of Huffington's version of the facts pertaining to his activities at the times here pertinent.

For reasons to be hereafter developed we find Huffington's contentions to be without merit. There is another reason for overruling his contentions, however. The presentence investigation came in without objection. It is true that when the presentence investigation was being considered by the trial judge Huffington made specific objections to the portions of the report to which he now objects. However, the report was received in evidence without objection on behalf of Huffington. The record reflects:

> "Cassilly [Assistant State's Attorney]: Excuse me, Your Honor, could we ... now that we've finally gotten our presentence put together, can we distribute this to the Jury at this point?
>
> "Court: You'll want to put that in? Yes.
>
> "Cassilly: Yes, please.
>
> "Drew [for the defense]: I have no objection, Your Honor, if you want....
>
> "Court: All right, it will be received and may be distributed to the Jury. (St. Ex. 5

> admitted into evidence. PSI, with deletions; photostat.)
>
> "Drew: Your Honor, I don't have any problem with it being distributed but I'd ask that the Court instruct the Jury not to begin reading it or anything until .... I'd like them to pay attention to my presentation rather than reading the PSI."

a. The institutional history

The section of the presentence investigation report pertaining to institutional history states:

> "On or about 12/6/83 the defendant, John Norman Huffington was cited for 1) refusing to obey a direct order and 2) creating a security threat. The defendant received ten days in disciplinary isolation for each of those infractions.
>
> "Evidently the defendant offered resistance to Deputy Minnick while being searched. As to the second infraction the defendant apparently interfered with the searching of other inmates in the cell block."

Bartholomey v. State, 267 Md. 175, 297 A.2d 696 (1972), involved the Maryland death sentence cases remanded to us by the Supreme Court of the United States for reconsideration in the light of its holding in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). In discussing the procedure to be followed by trial judges in re-sentencing those defendants, Chief Judge Murphy said for the Court:

> "[T]o aid the sentencing judge in fairly and intelligently exercising the discretion vested in him, the procedural policy of the State encourages him to consider information concerning the convicted person's reputation, past offenses, health,

habits, mental and moral propensities, social background and any other matters that a judge ought to have before him in determining the sentence that should be imposed. Skinker v. State, 239 Md. 234, 210 A.2d 716 (1965); Scott v. State, 238 Md. 265, 208 A.2d 575 (1965); Costello v. State, 237 Md. 464, 206 A.2d 812 (1965); Driver v. State, [201 Md. 25, 92 A.2d 570 (1952)]; Baker v. State, [3 Md. App. 251, 238 A.2d 561 (1968)]. The sentencing judge may, but need not, obtain a presentence report under Article 41, § 124 (b). Of course, the sentencing judge may take into consideration the defendant's conduct after the offense was committed, viz., he may consider evidence of events occurring after the date of the original sentencing to whatever extent he may deem necessary. North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed.2d 656 (1969); Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949); Purnell v. State, [241 Md. 582, 217 A.2d 298 (1966)]; Gatewood v. State, 15 Md. App. 450, 291 A.2d 688 (1972)." 267 Md. at 193-94, 297 A.2d at 706.

More recently in Logan v. State, 289 Md. 460, 425 A.2d 632 (1981), Judge Digges said for the Court:

> "In considering what is proper punishment, it is now well-settled in this State that a judge is not limited to reviewing past conduct whose occurrence has been judicially established, but may view 'reliable evidence of conduct which may be opprobrious although not criminal, as well as details and circumstances of criminal conduct for which the person has not been tried.' Henry v. State, 273 Md. 131, 147-48, 328 A.2d 293, 303 (1974)." 289 Md. at 481, 425 A.2d at 643.

We are not concerned here with crimes, as in Scott v. State, 297 Md. 235, 465 A.2d 1126 (1983), with which an accused was charged but had not yet been convicted. We believe that under our prior cases this institutional history was properly admissible.

b. Huffington's statement

It is customary in a presentence investigation for the defendant's version of the relevant facts to be set forth. The events leading to the death of the victims apparently occurred in the early morning hours of May 25, 1981. Huffington has summarized in his brief the relevant evidence adduced at trial. That pertaining to the critical time is:

> "At 2:00 a.m., Appellant, Kanaras, Hudson and Becker all left the nightclub and drove to the trailer. Once inside the trailer, Appellant paid Hudson $275.00 for three and one-half grams of cocaine. At that point, all concerned had ingested various quantities of cocaine and marijuana.
>
> "After completing the transaction, Appellant and Kanaras returned to Appellant's apartment and ingested more cocaine. Appellant then began making telephone calls in an effort to find a buyer for additional cocaine retained by Hudson. Appellant ostensibly found a buyer, and had Kanaras drive him back to Hudson's trailer. Arriving between 3:30 and 4:00 a.m., they picked up Hudson and drove him to the rural Wheel Road area of Harford County. According to Kanaras, after the three men exited the car Appellant shot and killed Hudson and removed a quantity of cocaine from the latter's pocket.
>
> "Appellant then turned the gun on Kanaras, forcing him to drive back to the Hudson trailer for the purpose of stealing money. Once inside the trailer, Appellant killed Diane Becker by striking her on the head with a vodka bottle and then stabbing her some 33 times with a knife. Under duress, Kanaras then helped Appellant steal a large amount of cash and Becker's purse, which contained narcotics and paraphernalia.
>
> "Kanaras' testimony continued that for the next several hours he remained with Appellant, helping him to dispose of evidence and to

> establish an alibi by attending a local 'fiddler's convention.' Kanaras remained with Appellant and refrained from informing anyone of the killings even after the disposal of the gun and knife used in the homicides because he remained 'scared' of Appellant."

The version obtained by the Parole and Probation agent as set forth in the presentence investigation report was as follows for the critical period:

> "About 1:45 a.m. the defendant and Kanaras left the Golden 40 and followed Hudson's car to an Edgewood 7-11 Store and then to Hudson's Motorhome. Diane Becker walked over to their car and asked them to wait until the people in the other car left. After the other vehicle left, the defendant and Kanaras entered the motorhome and all four (4) sat down. Hudson and the defendant discussed a future cocaine deal and Kanaras bought some cocaine from Hudson, after which Huffington and Kanaras left. They drove back to Huffington's apartment and both went inside. Kanaras allegedly wanted to party, but the defendant said he was tired and wanted to go to bed. Kanaras then left and the defendant went to sleep.
>
> "On 5/25/81 at about 9 a.m., Kanaras returned to Huffington's apartment and asked him to go partying. After showering, the defendant and Kanaras did some cocaine and drove around, heading toward the Fiddler's convention in Cecil County....
>
> "About 6:30 p.m. Kanaras called him asking him to cover for him, to tell anyone who asked, that they were at the Fiddler's Convention all night. The defendant claimed that at that time he did not know why Kanaras asked him to cover for him....
>
> "The defendant stated that he protected Kanaras with an alibi. He claimed that Kanaras never explained why he needed an alibi. The defendant denied participation in the crimes and denied his guilt to the charges. When asked if he had knowledge of or a hunch who committed the

> offense, the defendant said, 'I couldn't say.' He stated that he feels 'fed up' and has 'lost a lot of respect for the judicial system.'"

Relying upon Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), Huffington claims that the admission of his statement violates his rights under the Fifth Amendment to the United States Constitution as delineated in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). He makes no contention relative to Sixth Amendment rights. In Estelle the Court said, "We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." 451 U.S. at 462-63, 101 S. Ct. at 1873, 60 L. Ed. 2d at 369. The Court further said:

> "'Volunteered statements ... are not barred by the Fifth Amendment,' but under Miranda v. Arizona, supra, we must conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not 'given freely and voluntarily without any compelling influences' and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them. Id., at 478. These safeguards of the Fifth Amendment privilege were not afforded respondent and, thus, his death sentence cannot stand."[13]

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13. Of course, we do not hold that the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination." 451 U.S. at 469, 101 S. Ct. at 1876, 60 L. Ed. 2d at 373.

We simply do not find Estelle or Huffington's Fifth Amendment rights applicable to the statement in the case at bar. We have set forth Huffington's version of the evidence and the statement in question at some length in order that there may be no misunderstandings. It is true that Huffington in his statement indicated that he had been in the company of Kanaras and of the victims, Diane Becker and Joseph Hudson. However, according to the statement given by Huffington, at the time when the alleged crimes were being committed he was home by himself and asleep. We find no infringement of Huffington's rights against self-incrimination.

iv. Victim participation

Code (1957, 1982 Repl. Vol.) Art. 27, § 413(g)(2) provides that a mitigating factor shall be that "[t]he victim was a participant in the defendant's conduct or consented to the act which caused the victim's death." Huffington contends that Hudson was a participant in the conduct leading to his death and hence Huffington was entitled as a matter of law to this mitigating factor.

Art. 27, § 413(g), enacted by Ch. 3 of the Acts of 1978, is modeled after § 210.6(4)(c) of the Model Penal Code. The latter states relevant to mitigating factors, "The victim was a participant in the defendant's homicidal

conduct or consented to the homicidal act." There are no relevant cases, annotations, or legislative references concerning either section which we have been able to find. Accordingly, the commentary note to the Model Code provision is of importance. II Model Penal Code and Commentaries, § 210.6 (1980) states:

> "Paragraph (c) addresses the case where the victim is partially responsible for his own death. This circumstance obtains chiefly in two kinds of situations. First, there are occasions in which the defendant and his victim are engaged jointly in an activity highly dangerous to each. If each person's participation depends upon the cooperation of the other, a murder conviction may lie for the death of one actor, even though both share responsibility. An example may be the case of Russian roulette, at least where the defendant actually fires the shot that kills his partner. A second situation within the scope of Paragraph (c) is the true mercy killing. There the defendant's homicidal act may not have occurred had the victim not consented to it. In either of these contexts, the conduct of the victim in bringing about his own death deserves consideration as a mitigating factor in assigning a death sentence." Id. at 140-41.

Huffington contends:

> "Hudson's activity falls within the first situation. Accompanying known drug dealers to a rural area in the middle of the night has much in common with 'Russian roulette' - the chance of becoming a victim of crime in that circumstance is probably better than one in six. Hudson's activity was illegal, foreseeably dangerous, and very much a part of Appellant's conduct. Absent the victim's participation in this illegal and dangerous activity, there would have been no murder. The mitigating factor should have been returned and considered." (Emphasis in original.)

Kanaras testified as to Hudson's death:

> "Ah, I parked the car, and where the car was parked it wasn't too much room on each side of the road, it was like a slight embankment on one side and an embankment on the other side, so two people really couldn't fit together coming out of the car, so I got out of the driver's side of the car and Joe Hudson got out of the passenger side of the car, and we met at the -- the back of the car, and John Huffington was right behind too, about three or four steps, and as we walked up to the house, that's when I heard these shots -- four or five shots rang out, and I saw Joe Hudson fall - fall to the ground to his -- on his side, and he rolled -- he rolled over ...."

This was the evidence before the jury. It does not make Hudson out as a participant in Huffington's conduct which caused Hudson's death. According to the testimony Hudson and Huffington were joint participants and co-conspirators in an alleged drug sale. The conduct which caused Hudson's death related to Huffington's carrying and concealing a loaded pistol and the firing of such pistol at Hudson's back. It is beyond the stretch of anyone's imagination to say that Hudson participated in this conduct.

We have recently stated, "It is the accused's burden to prove, by a preponderance of the evidence, the existence of a mitigating circumstance. [Section] 413(g); Tichnell v. State, 287 Md. 695, 730, 415 A.2d 830, 848-49 (1980)." Stebbing v. State, 299 Md. 331, 361, 473 A.2d 903, 918 (1984). In the case at bar Huffington failed to carry his burden concerning proof of the mitigating factor that Hudson participated in the acts causing his death. Moreover, the

issue was not presented to the trial court. Hence, it is deemed waived. Rule 885.

v. Arbitrariness in seeking the death penalty

At one point in the proceedings Huffington proffered a guilty plea in exchange for a life sentence. Huffington asserts that defense counsel was "under the impression that the State had conditionally accepted the offer," but then rejected it when the parents of Becker found it unacceptable. Huffington moved to strike the notice of intention to seek the death penalty, contending consideration of the wishes of the family made this an arbitrary factor. He relies upon Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), and Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

The State reponds that it "had already made [the] decision [to seek the death penalty], given notice to [Huffington], and proceeded to trial prior to the alleged 'arbitrary' action." It contends that the feelings of victims' families are legitimate considerations and that in any case it is not bound to accept a proposed plea agreement. It further asserts:

> "In this case the Court at sentencing invoked a novel procedure when it allowed the defense to place plea negotiations before the sentencing jury and argue that the State's consideration thereof should be a mitigating factor. In other words, the jury was allowed to determine whether the

> State's response to the defense's offer was some indication that the death penalty was not appropriate in this case. The State protested such action below and it is the State's position here on appeal that this procedure gave Appellant more than he was entitled to."

In Calhoun v. State, 297 Md. 563, 468 A.2d 45 (1983), the accused mounted an attack upon our death sentence statute based upon what he called the prosecutor's "unbridled exercise of discretion" under Art. 27, § 412(b). We considered Gregg and Furman and concluded:

> "Absent any specific evidence of indiscretion by prosecutors resulting in an irrational, inconsistent, or discriminatory application of the death penalty statute, Calhoun's claim cannot stand. To the extent that there is a difference in the practice of the various State's attorneys around the State, our proportionality review would be intended to assure that the death penalty is not imposed in a disproportionate manner." 297 Md. at 605, 468 A.2d at 64.

We do not regard consultation with the family of the victim here, after the State had already made a decision to seek the death penalty and after trial had begun, as any evidence of indiscretion by a prosecutor. We hold this contention to be without merit.

vi. The indictment

At Huffington's first trial a special verdict form was used. The jury convicted him of two felony murders and specifically acquitted him on charges that the two murders were premeditated. Huffington v. State, 302 Md. 184, 186, 486 A.2d 200, 201 (1985). The conviction was reversed on appeal. As Huffington puts it, "The State elected to try the second case on the same indictment, which appears to have been modified to reflect the exclusion of premeditated murder from the case." The charge of murder of Hudson reads as follows:

> "The Jurors of the State of Maryland, for the body of Harford County, do on their oath present that JOHN NORMAN HUFFINGTON, late of said County, on or about the 25th day of May, 1981, in the County aforesaid, unlawfully, willfully and of deliberately premediated [sic] malice aforethought did kill and murder Joseph Mallison Hudson, Jr., contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State."
> "(Murder, First Degree, Art. 27, §§ 407, 410, 412, 413, 616)."

Except for not striking out the inapplicable sections of the Code, the count in the indictment pertaining to the death of Diane Becker is identical, including the misspelling of "premeditated."

Huffington challenges his indictment on the ground that "[t]he charging documents ... listed the elements for premeditated murder, but not felony-murder." He objects on jurisdictional grounds and constitutional grounds. In the trial court no pretrial motion was made pertaining to the adequacy of the indictment. There was a motion to dismiss on double jeopardy grounds, an issue which we considered and

rejected in Huffington v. State, 302 Md. 184, 486 A.2d 200 (1985).

In Williams v. State, 302 Md. 787, 490 A.2d 1277 (1985), Chief Judge Murphy recently said for the Court:

> "Under Maryland Rule 4-252(a) (formerly Rule 736a), a motion alleging a 'defect' in the charging document 'other than its failure to show jurisdiction in the court or its failure to charge an offense' must be filed within a designated time period prior to trial or the defect is waived.[2] The rule provides in subsection (c) that a motion 'asserting failure of the charging document to show jurisdiction in the court or to charge an offense may be raised and determined at any time.' A claim that a charging document fails to charge or characterize an offense is jurisdictional and may be raised, as here, for the first time on appeal. See Putnam [v. State, 234 Md. 537, 200 A.2d 59 (1964)]; Baker [v. State, 6 Md. App. 148, 250 A.2d 677 (1969)]; Maryland Rule 885. Where the claimed defect is not jurisdictional, it must be seasonably raised before the trial court or it is waived.

> "2. For good cause shown, the rule permits the trial court to order otherwise." 302 Md. at 792, 490 A.2d at 1279-80.

To like effect see Hall v. State, 302 Md. 806, 809, 490 A.2d 1287, 1288 (1985). It follows, therefore, that any constitutional claim is waived because there was not a motion filed within the time limited by the rule.

The indictment was in the statutory form. Judge Cole recently said for the Court in Robinson v. State, 298 Md. 193, 202, 468 A.2d 328, 333 (1983), "[A]t least as a matter of state non-constitutional law, the legislatively enacted

short-form indictment is presumed to be sufficient to charge the offense named in the statute," referring to felony-murder. Hence, Huffington cannot prevail on this issue.

vii. The constitutional issues

Huffington recognizes, as indeed he must, that we have heretofore found the Maryland Capital Punishment Statute to be consistent with the requirements of the Constitution of the United States. However, he draws upon the dissent by Justice Marshall, joined by Justice Brennan, to the denial of certiorari by the Supreme Court in Stebbing v. Maryland, U.S. , 105 S. Ct. 276, 83 L. Ed. 2d 212 (1984), and suggests that "serious flaws exist in Maryland's statutory scheme." He asserts that "in at least two respects -- manditoriness and a defendant's burdens -- the Maryland procedure is substantially different from procedures found constitutional by the Supreme Court." Hence, he "urges reconsideration of these issues under Amendments Eight and Fourteen of the United States Constitution and Article 25 of the Maryland Declaration of Rights."

Cases in which we have considered and rejected constitutional attacks similar to that here raised include Foster v. State, Md. , , A.2d , (1985) [Nos. 43 and 91, September Term, 1984, decided November 12, 1985]; Evans, Md. at , A.2d at [Nos. 66 and

98, September Term, 1984, decided November 12, 1985]; Colvin v. State, 299 Md. 88, 122-27, 472 A.2d 953, 970-72 (1984); Calhoun v. State, 297 Md. 563, 635-38, 468 A.2d 45, 80-81 (1983), and Tichnell, 287 Md. at 720-34, 415 A.2d at 843-50. We deem the matter to be settled.

viii. Multiple murders

Huffington contends that the State improperly used the death of more than one person as an aggravating factor while at the same time seeking two death sentences.

Code (1957, 1982 Repl. Vol.) Art. 27, § 413(d)(9) lists that "[t]he defendant committed more than one offense of murder in the first degree arising out of the same incident" as an aggravating circumstance which may be considered by the sentencing authority. Separate findings and sentencing determination forms were submitted to the jury pertaining to the death of each of the victims. In each instance the jury found that the defendant committed more than one offense of murder in the first degree arising out of the same incident. In each instance the jury also found as an aggravating factor that Huffington committed the murder while committing or attempting to commit robbery, arson, or rape or sexual offense in the first degree, a factor spelled out in Art. 27, § 413(d)(10).

Huffington argues:

> "Obviously, the legislature intended that only one death sentence be returned in a case where more than one person was killed: Imposition of a second death sentence is redundant, and is inconsistent with the purpose of making the additional murder(s) an aggravating factor. Such double punishment is improper."

In the recent case of Thomas v. State, 301 Md. 294, 483 A.2d 6 (1984), the defendant was convicted of murdering a husband and wife in the same incident. The State sought two death sentences. The trial judge, as the sentencing authority, found with respect to both homicides the aggravating factor authorized by § 413(d)(9), namely that Thomas committed more than one offense of murder in the first degree arising out of the same incident. We said, "We find no error in the trial court's application of § 413." Thomas is dispositive of this contention.

ix. Proportionality review

Code (1957, 1982 Repl. Vol.) Art. 27, § 414(e) provides:

> "(e) Considerations by Court of Appeals. -- In addition to the consideration of any errors properly before the Court on appeal, the Court of Appeals shall consider the imposition of the death sentence. With regard to the sentence, the Court shall determine:
>
> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> "(2) Whether the evidence supports the jury's or court's finding of a statutory aggravating circumstance under § 413 (d);

"(3) Whether the evidence supports the jury's or court's finding that the aggravating circumstances are not outweighed by mitigating circumstances; and

"(4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

We do not find the death sentence here to have been imposed under the influence of passion, prejudice or any other arbitrary factor. We find that the evidence supports the jury's finding of statutory aggravating circumstances under § 413(d). We further find that the evidence supports the jury's finding that the aggravating circumstances are not outweighed by mitigating circumstances.

We turn to the proportionality review to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In Thomas v. State, 301 Md. 294, 483 A.2d 6 (1984), Chief Judge Murphy said for the Court:

"The principles governing proportionality review of a death sentence in Maryland have been stated in a number of our cases. Stebbing v. State, 299 Md. 331, 473 A.2d 903 (1984); Colvin v. State, 299 Md. 88, 472 A.2d 953 (1984); Calhoun v. State, 297 Md. 563, 468 A.2d 45 (1983); Tichnell v. State, 297 Md. 432, 468 A.2d 1 (1983). The fundamental object of the statutorily mandated appellate review process is the avoidance of the arbitrary or capricious imposition of the death penalty by affording similar treatment to similar capital cases. Tichnell, 297 Md. at 466, 468 A.2d 1. The focus of § 414(e)(4) is upon capital cases

in which the sentencing authority determined to impose a life or death sentence; the subsection aims to assure that upon consideration of both the crime and the defendant the aggravating and mitigating circumstances present in one capital case will lead to a result similar to that reached under similar circumstances in another capital case, thus identifying the aberrant sentence and avoiding its ultimate imposition. Id. 297 Md. at 465, 468 A.2d 1. Our procedure is to review all reports filed by trial judges in capital sentencing cases, as required by Maryland Rule 772A, and to select those which we deem 'similar' within the contemplation of the statute." 301 Md. at 334-35, 483 A.2d at 27.

Huffington is now 23 years of age and was about two and a half months short of 19 years of age at the time of the incident in question. As we have indicated, in each of the two homicides the jury found the aggravating factors that the defendant committed more than one offense of murder in the first degree arising out of the same incident and that he committed each murder while committing or attempting to commit robbery, arson, or rape or sexual offense in the first degree. Mitigating circumstances found by a preponderance of the evidence were the youthful age of the defendant at the time of the crime and that he had not previously been found guilty of a crime of violence, entered a plea of guilty or nolo contendere to a charge of a crime of violence, or had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence.

The evidence shows that Huffington murdered Joe Hudson by shooting him five times in the back and head and that he

then stole drugs from Hudson's person. It further shows that Huffington then went to Hudson's mobile home and there murdered Diane Becker by striking her with a bottle and then stabbing her thirty-three times. He took money and drugs from the home before fleeing.

In Tichnell v. State, 297 Md. 432, 469, 468 A.2d 1, 20 (1983), we set forth the "relevant universe" to be considered by us in our proportionality review. In the process of our review in this case we have considered each of the reports submitted by trial judges under Maryland Rule 4-343. We have selected eight which we deem to be "similar" within the contemplation of Art. 27, § 414(e)(4).

Lawrence Johnson. Johnson was 17 years and 10 months old at the time of the commission of his crimes. According to the report of the trial judge he and his cousin entered a dwelling house through a basement window. Once inside they went up the basement steps to the first floor where they discovered the presence of the victim, who was 78 years old, small in stature, weighed but ninety pounds and was home alone. When their demands for money were not satisfied they grabbed her and shoved her into a spare bedroom. In the course of this episode the victim was brutally beaten with a broom handle, stomped on and kicked, tied, and strangled to death.

The jury found as an aggravating circumstance that the murder was committed while committing or attempting to commit robbery, arson or rape or sexual offense in the first degree. Mitigating circumstances found were that the defendant was not the sole proximate cause of the victim's death and, under "[o]ther mitigating circumstances," the life sentence of the co-defendant. The jury sentenced to death.

Donald Thomas. Thomas was 23 years old when he committed the acts which brought him to the bar of justice. The trial judge in his report summarized the facts:

> "Somehow on the night of October 1-2, 1981, the Defendant and the deceased, Donald Spurling, were in joint company with each other. This association appeared friendly. After visiting at least one person, and a bar, they subsequently ended up at the Spurling residence in Baltimore County. For some motivation unbeknownst to the Court, the Defendant killed, with multiple stab wounds, Donald Spurling. Mrs. Spurling, who was apparently awakened by some noise, was subsequently stabbed to death by multiple wounds by the Defendant and sexually molested by the Defendant either during or after her life [sic]. The Defendant then went to the second floor and raped a young woman in her bed, who was a boarder of the Spurling residence. She ultimately escaped by jumping out of the second story window."

The trial judge found as the sole aggravating circumstance that Thomas had committed more than one murder. No statutory mitigating circumstances were found to exist. The judge did find under "[o]ther mitigating circumstances" "demographic characteristics and background of defendant."

The trial judge, as the sentencing authority, concluded that the aggravating circumstances outweighed the mitigating circumstances and imposed the death penalty.

Willie Green. Green was 40 years of age when he and an accomplice murdered two employees of a restaurant in the course of a robbery. The victims were both stabbed to death. One victim had his hands tied behind him and his throat was slit. Two aggravating circumstances were found to exist, that Green committed more than one murder in the first degree arising out of the same incident and that the murders were committed during the commission of a robbery. Mitigating circumstances found were that the defendant was not the sole proximate cause of the deaths of the victims and that it was unlikely in view of his age that he would engage in further criminal activity. The trial judge was the sentencing authority. He found by a preponderance of the evidence that the mitigating factors outweighed the aggravating factors. Accordingly, life sentences were imposed.

Eugene Sherman Colvin. Colvin broke into a house. In the course of the crime he encountered the victim who was visiting in the home of her daughter. The victim was stabbed twenty-eight times about the throat. The weapon used was an eight-inch serrated knife taken from the kitchen of the home. About $10,000 in jewelry was removed from the

residence. The victim's money was taken. Colvin was found guilty of premeditated murder, felony murder, robbery with a deadly weapon, and housebreaking.

As an aggravating circumstance the jury found that the murder was committed while committing or attempting to commit robbery, arson, or rape or sexual offense in the first degree. No mitigating circumstances were found. Colvin had been convicted several times of burglary, assault, and larceny. The jury imposed the death sentence.

James Arthur Calhoun. Calhoun was 28 years of age when he became involved in an incident leading to his conviction of premeditated first degree murder of a Montgomery County police officer who had responded to a security alarm at a mercantile establishment. The officer, in company with the assistant manager of the store and a representative of the burglar alarm system for the store, entered a room inside the store where Calhoun and an accomplice had concealed themselves. Calhoun pressed a gun against the officer's head and shot him to death. Calhoun's accomplice, Curtis Monroe, shot and killed the alarm system representative and wounded the assistant manager. Calhoun and Monroe took money from the store and fled. The jury found as aggravating factors: (1) The victim was a law enforcement officer who was murdered in the performance of his duties; (2) the defendant committed the murder in furtherance of an escape

or an attempt to escape from or evade the lawful custody, arrest or detention of or by an officer or guard of a correctional institution or by a law enforcement officer, and (3) the defendant committed the murder while committing or attempting to commit robbery. The only mitigating circumstance found was set forth under "[o]ther mitigating circumstances." The jury stated:

> "This jury feels that a substantial mitigating factor is the defendant's background, which has been such that he has never been integrated into society. Therefore, he has been and is unable to conform with its norms and moral values."

The jury imposed a death sentence.

Curtis Wayne Monroe. Monroe is the same Monroe mentioned relative to James Arthur Calhoun. The incident is also the same. The report of the trial judge relative to the facts, states:

> "The police officer was pulled into a room, subdued, and shot in the head by Calhoun. At the same time, Monroe began firing a handgun, wounding the assistant manager, Douglas Cummins, and firing two shots into the alarm technician, David Myers, resulting in the death of Mr. Myers."

Monroe waived a jury and elected to have the sentencing procedure before the trial judge. As an aggravating circumstance it was found beyond a reasonable doubt that Monroe "committed the murder while committing or attempting to commit robbery, arson or rape or sexual offense in the first degree." The trial judge noted two mitigating circumstances.

First, he found that it was unlikely the defendant would engage in further criminal activity that would constitute a continuing threat to society. Second, under "[o]ther mitigating circumstances," he found:

> "Defendant has been employed, has a wife and two children.
>
> "The actions of the defendant causing the murder, along with his background when compared to the other first degree murder cases occurring since the enactment of Article 27, Section 413, in which the death penalty has not been imposed.
>
> "Efforts by the defendant since his incarceration to further his education."

Life imprisonment was imposed. In his report to us the trial judge said:

> "The primary consideration in not imposing the death penalty was the Court's own proportionality test in comparison to other offenses in the Circuit Court for Montgomery County in which the death penalty had been sought but not imposed, and a comparison between Curtis Wayne Monroe and the co-defendant James Arthur Calhoun, who received the death penalty, indicated that the imposition of the death penalty was not appropriate in this case. Other mitigating circumstances did not outweigh the aggravating factor and the nature of the offense."

Jackie Hughes. While a manager of a restaurant was walking to a nearby bank to deposit weekend receipts, Hughes approached him from behind, grabbed him, spun him around, and shot him in the stomach. After a brief struggle Hughes wrested away the deposit. The victim, who was licensed to carry a handgun, fired several shots at Hughes at close

range. A jury found Hughes guilty of first degree murder on the basis of the fact that it was a deliberate, willful and premeditated murder as well as a felony murder.

The jury found as an aggravating factor that the murder was committed while committing or attempting to commit a robbery. As a mitigating factor it found that Hughes had not previously been convicted of a crime of violence, etc. It also checked on the sentencing form that other mitigating circumstances existed. However, it listed no such circumstances. The jury returned a sentence of life imprisonment.

Brian Keith Quickley. Quickley and two others entered a furniture store in Harford County. An accomplice lured the victim to an area of the store isolated from the cash register. Quickley there shot the victim once between the eyes and again, as he was falling, in the back of the neck. The three individuals then left the store, taking television sets with them.

The jury found one aggravating circumstance, that the defendant committed the murder while committing or attempting to commit a robbery. It found two mitigating circumstances. The first was the youthful age of the defendant at the time of the crime. The second, under "[o]ther mitigating circumstances," was:

> "The defendant is at the borderline range of intelligence with severe intellectual limitations both at the verbal and performance measured

> levels. His overall Intelligence Quotient was scored at 71. He is the product of an impoverished, social and educational environment. His academic progress has been limited. He has been in and out of Special Education and last attended the ninth grade. Extensive materials (tests, reports, etc.) from Juvenile Services, Harford County Public School System, the Maryland Children's Center and various social service groups have been filed in these proceedings as exhibits that demonstrate these inabilities."

The jury sentenced him to life imprisonment.

We find the sentences not disproportionate to those imposed in similar cases. It thus follows that the death sentences must be affirmed.

JUDGMENT AFFIRMED.

IN THE COURT OF APPEALS OF MARYLAND

Nos. 64 and 133

September Term, 1984

JOHN NORMAN HUFFINGTON

v.

STATE OF MARYLAND

Murphy, C.J.
Smith
Eldridge
Cole
Rodowsky
Couch
McAuliffe,

JJ.

Dissenting Opinion by McAuliffe, in which Eldridge and Cole, JJ., concur.

Filed: November 13, 1985

I cannot agree that the trial judge properly excluded a transcript of the testimony of Stephen Rassa. Rassa's testimony was critical to Huffington's defense, and Rassa could not be found. Huffington therefore offered a transcript of testimony given by Rassa as a State's witness in the prosecution of Deno Kanaras, but this evidence was rejected on the ground the State had no opportunity to cross-examine its own witness. The majority recognizes that direct-examination by the party against whom the testimony is offered may be sufficient to justify the admission of previous testimony, but affirms on the basis that the motives of the State at the time it offered the evidence differed significantly from those of Huffington when he offered it. A careful analysis of the facts will disclose, however, that Huffington and the State each wanted to develop precisely the same facts from Rassa, and that each did so for the purposes of impeaching Kanaras' credibility and discrediting his claim of duress. That the State's motive in the first case was to convict Kanaras by discrediting his testimony and its motive in the second case was to convict Huffington by relying on Kanaras' testimony is simply irrelevant. It is the identity of the motives of the two parties who offer the testimony that is material, and not the shifting motives of the State.

The general rule applicable in this situation is not in dispute. Professor Wigmore wrote:

> [T]he whole notion of cross-examination refers to one's right to probe the statements of an opponent's witness, not one's own witness; thus, if A has taken X's deposition or called X to the stand, and B has cross-examined, it is not for A to object that he has not had the benefit of cross-examination; that benefit was not intended for him nor needed by him; it was intended only to protect against an opponent's witness, who would be otherwise unexamined by A; and if A has had the benefit of examining a witness called on his own behalf, he has had all that he needs, and the right to probe by cross-examination is B's, not A's.
> 5 Wigmore, Evidence §1389 at 105 (3d ed. 1940).

And in a more recent text the authors pose and answer the question in this fashion:

> Is the opportunity for direct and redirect examination the equivalent of the opportunity for cross-examination? If party A (or his predecessor in interest) calls and examines a witness in the first hearing, and this testimony is offered against A in a second trial, may it come in against the objection of want of opportunity to cross-examine? The decisions sensibly hold that it may.
> McCormick on Evidence §255 at 762 (E. Cleary 3d ed. 1984).

Fed. R. Evid. 804(b)(1) is to the same effect, and describes the circumstances under which the former testimony of an unavailable witness will not be excluded by operation of the hearsay rule:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The pivotal question, then, is whether the State had a motive similar to that of Huffington to develop the testimony of Rassa. This in turn requires a consideration of the issues intended to be addressed by the testimony in each case, and as indicated by the following advisory committee note to Fed. R. Evid. 804(b)(1) the question is whether there exists a "substantial" identity of issues.

> The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would not be done if the opportunity were presented. Modern decisions reduce the requirement to "substantial" identity. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable. (Citation omitted).

We look first at Huffington's motive in seeking to introduce the testimony of Rassa. It was clear from the State's evidence that only two persons in

addition to the victim were present on the occasion of each murder--Kanaras and Huffington. Kanaras was therefore the State's principal witness against Huffington. Kanaras testified that he was with Huffington on the night of the murders, but that Huffington killed each victim. Kanaras denied any previous knowledge that Joseph Hudson or Diane Becker were going to be robbed or murdered, and he further asserted that while he had been forced by Huffington at gunpoint to provide some assistance he did not assist in any way in the actual killing of the victims.

Kanaras testified he had known Hudson and Huffington for some time, and had purchased drugs from both of them. On the night in question he and Huffington were attempting to purchase cocaine when they met Hudson and Becker (Hudson's girlfriend) at a bar. Arrangements were made to buy the drug from Hudson, and Kanaras drove Huffington to the trailer shared by Hudson and Becker. Kanaras said Hudson sold them 3.5 grams, which appeared to be about half the supply Hudson had on hand. He said he and Huffington then returned to Huffington's apartment where they used some cocaine and Huffington apparently made calls in an attempt to broker the sale of Hudson's remaining cocaine. Acting on the belief that Huffington had found a buyer, and upon the promise that

Huffington would give him some additional cocaine for providing transportation, Kanaras said he drove Huffington back to the Hudson trailer, where Hudson joined them. He then drove, at the direction of Huffington, to a rural area in Harford County and stopped near a farmhouse. According to Kanaras, he was walking alongside Hudson toward the farmhouse to meet the prospective purchaser when Huffington fired five shots into Hudson. Kanaras said that Huffington then reloaded the pistol, rolled the body of Hudson over, and fired two more shots into Hudson's head at point-blank range. Kanaras admitted that the weapon used had once been owned by him, but claimed he had sold it to Huffington about five weeks earlier.

Kanaras said Huffington then pointed the gun at him and ordered him to drive back to the trailer. Once inside the trailer Kanaras was directed to search for Hudson's money. Following a successful search, Kanaras said Huffington struck the sleeping Diane Becker several times with a heavy bottle, and then repeatedly stabbed her with a knife Huffington produced from his boot. Kanaras testified he was then forced to accept a large amount of the money that had been stolen from Hudson, and to assist Huffington in destroying or disposing of evidence and attempting to establish an alibi. Kanaras denied he had been to Hudson's trailer during

the week preceding the murders, and denied having possessed a gun at that time.

Rassa's testimony dealt with the events of May 20, 1981, five days before the murders. Rassa testified he and Kanaras had driven to Hudson's trailer on that date, to buy cocaine. In response to direct questions by the State's Attorney, Rassa described the events immediately preceding entry into Hudson's trailer:

> A. Well, there had been a lot of discussion on the way down Long Bar Harbor Road between Deno and myself, and Deno had told me he was interested in going to Joe's trailer - Joe Hudson - to buy some cocaine.
>
> ****
>
> Deno became very quiet. He wasn't holding any conversation with me. Because I had had prior conversations with him about Joe Hudson and Diane Becker. I was nervous and I wasn't sure what was going to happen down that road and I wanted a chance to kind of find out what he was thinking about so that I might be able to talk him out of it. . . .
>
> ****
>
> Q. [By State's Attorney] . . . As a result of certain conversations you had with Deno in the car right before you got to Hudson's trailer on the 20th, tell us - right before you went into the trailer, tell us what you said to him and what he said to you?
>
> A. Okay. As he was pulling his car to a stop outside of the motor home - excuse me - I want to be absolutely sure. I can

> remember that as the car was coming to a stop he turned towards me and he reached underneath of my seat, and I said, "What are you doing", and he said, "I'm getting my gun." And I said, "Leave it there. Don't get your gun. I don't want any parts of anything like this." And I looked both ways outside of the car because I didn't want to be seen. I wasn't really sure what was going to happen at that time. . . .
>
> ****
>
> I said, "Come on, Deno, let's go in.", and he said, he reached under the seat again, and I said again, "What are you doing?", and he said, "I'm just getting my gun. I just want to show it to you," And I said, "Deno, I don't need to see your gun. I've seen it before. Just leave it there." At that time I said to Deno "Is there something you're not telling me? Do you owe Joe money?" And there was no reply. I looked at him and I said, "Do you actually think that you could actually rob and shoot somebody in the middle of a crowded trailer park like this in daylight, and do you actually think you could shoot someone?" And there was no reply. Deno then - excuse me - I said to Deno - no, excuse me again - Deno said, "I have a knife in the glove compartment." And I said, "Are you crazy? Do you actually think you could stab someone with a knife?" He said, "No, but you could", referring to myself. And I told him I didn't want any parts of any of this."

On cross-examination Rassa said that on several occasions prior to May 20th he and Kanaras had discussed the possibility of robbing Hudson, and that he, rather than Kanaras, had initiated further discussion of the subject on that day.

Huffington's motive in offering this testimony is clear. Rassa directly contradicted Kanaras' testimony that he had not been to the Hudson trailer on May 20th, that he had not had a gun on that date, and that he had not discussed robbing Hudson at that time. Furthermore, if the jury believed that Kanaras was contemplating a robbery of Hudson just five days before the robbery and murders occurred, and was discussing with Rassa the possible use of the very types of weapons actually thereafter used, the jury would most likely refuse to believe Kanaras' protestations of being an innocent pawn in the hands of Huffington. Rassa's evidence permitted a reasonable inference that Kanaras had been a principal actor in the robbery and murder, and such evidence may well have created a reasonable doubt in the minds of the jurors that Huffington was the actual killer.

Turning to the State's motive in offering the testimony of Rassa during the trial of Kanaras, it is apparent that it was substantially, if not precisely identical to Huffington's motive. Testimony given by Kanaras in his own behalf was the same as that later given by him against Huffington. See Kanaras v. State, 54 Md.App. 568, 570-72, 460 A.2d 61, cert. denied, 297 Md. 109 (1983). Kanaras' defense was that he did not knowingly aid or abet in the death of

Hudson, and that any assistance rendered thereafter was under duress. Following Kanaras' testimony, the State offered the testimony of four rebuttal witnesses. The proffered testimony of these witnesses was summarized by the Court of Special Appeals as follows:

> It was proffered that Stephen Rassa would testify that on May 20, 1981, shortly before purchasing cocaine from Hudson and Becker, Kanaras supposedly had to be dissuaded from robbing Hudson and stealing his cocaine. It was further proffered that Dale Saunders, Jr. would testify that Huffington and Kanaras came to "shake him down for money" due on a drug debt. Maryland State Trooper Gary Aschenbach, according to the State's proffer, would testify that while working undercover in early 1981, Kanaras had purchased drugs for him, had on one occasion carried a gun in anticipation of a large drug deal, and had expressed interest in an illegal scheme to destroy a boat for money. The testimony of Thomas Wagner, according to the State, would show that Kanaras had shown him what was to be the murder weapon.
> Kanaras v. State, supra, 54 Md.App. at 589.

Expressing some uncertainty that all the evidence proffered by the State was properly offered as rebuttal, the trial judge allowed the State to reopen its case, and thus Rassa's testimony became a part of the State's case in chief.

The majority states that "the purport of Rassa's testimony was that a few days before the incident in question Kanaras was still involved with drugs" and that this evidence was offered in rebuttal to Kanaras' earlier testimony that he

had been free from drugs for some time before the murders. From this the majority concludes that the very limited objective of the State in offering this testimony differed substantially from the broader scope later intended by Huffington, and that the State therefore had no reasonable opportunity or motive to fully develop the facts about which Huffington was later concerned. The majority's conclusion is not supported by the facts. Kanaras had at all times readily admitted his involvement as a buyer and user of drugs. He did deny, however, that he sold drugs. The Court of Special Appeals held that rebuttal evidence would be proper to show that Kanaras had been involved as a seller, but this clearly was not the principal thrust of Rassa's testimony.[1] A fair reading of the entirety of Rassa's testimony discloses an intent on the part of the State to discredit Kanaras' testimony, and show him to have been a principal. The Court of Special Appeals summed up the intent of the State when it said:

> [A]n important facet of the State's case was to prove that the appellant was a voluntary participant in the crimes. As such, it was proper to show that Kanaras both needed and lusted for money, had participated in prior drug transactions, and may have specifically considered robbing Hudson. The additional State's evidence supplied a motive for the crimes and supplied evidence of advance preparation for the crimes. As such, it was admissible to show an independent intent and motive to commit the crimes.
> Kanaras v. State, supra, 54 Md.App. at 595.

[1] Rassa did not testify to any sale of drugs by Kanaras, but he did say that he and Kanaras had on occasion jointly attempted to sell methamphetamine.

The importance of Rassa's testimony to assist the trier of fact in assessing the credibility of Kanaras is perhaps best illustrated by the argument of the State's Attorney in support of the State's motion to have Kanaras called as a court's witness.[2]

> The following reasons, I'm going to basically go through a skeleton sketch of what he would testify and and why we don't believe we can believe him. His first indication would be that the first time that he had heard this particular incident or that this came about that he was aware that anybody was going to rob Joseph Hudson and Diane Becker was that night that it actually occurred--first of all, a witness tes--has testified, a State's witness has testified in a prior trial that Kanaras had discussed with him and tried to get him to rob Hudson sometime prior to this, and therefore we believe--it is the State's contention that we believe--what we believe is that Kanaras wanted to rob Hudson, didn't have the whatever to do it by himself, and continued looking for someone to help him with this robbery after that contact with that particular individual, and that he was

[2] This motion was denied, and Kanaras was called as a State's witness.

> successful in finding this other person in the person of the defendant before the Court. That's the State's theory of the case.

The previous sworn testimony of Rassa was necessary for the proper presentation of the defendant's case and substantial reasons existed to assume its reliability. The testimony was admissible under accepted rules of evidence in this State, and in any event admissible to afford the defendant due process of law. Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). I would reverse the conviction and remand for a new trial.

I am authorized to state that Judges Eldridge and Cole concur in the views here expressed.

APPENDIX B

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment XIV, provides in pertinent part:

> ...[N]or shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within the jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Maryland Code (1957, 1982 Repl. Vol.) Art. 27, Secs. 412-414 provides:

Section 412. Punishment for murder.

(a) Designation of degree by court or jury. -- If a person is found guilty of murder, the court or jury that determined the person's guilt shall state inthe verdict whether the person is guilty of murder in the first degree or lmurder in the second degree.

(b) Penalty for first degree murder. -- A person found guilty of murder inthe first degree shall be sentenced either to death or to imprisonment for life. The sentence shall be imprisonment for life unless (1) the Statenotified the person in writing at least 30days prior to trial that it intended to seek a sentence of death, and advised the person of each aggravating circumstance upon which it intended to rely, and (2) a sentence of death is imposed in accordance with Sec. 413.

(c) Penalty for second degree murder. -- A person found guilty of murder in the second degree shall be sentenced to imprisonment for not more than 30 years.

Section 413. Sentencing procedure upon finding of guilty of first degree murder.

(a) Separate sentencing proceeding required. -- If a person is found guilty of murder in the first degree, and if the State had given the notice required under Sec. 412(b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial has been completed to determine whether he shall be sentenced to death or imprisonment for life.

(b) Before whom proceeding conducted. --This proceeding shall be conducted:

(1) Before the jury that determined the defendant's guilt; or

(2) Before a jury impaneled for the purpose of the proceeding if:

(i) The defendant was convicted upon a plea of guilty;

(ii) The defendant was convicted after a trial before the court sitting without a jury;

(iii) The jury that determined the defendant's guilt has been discharged by the court for good cause; or

(iv) Review of the original sentence of death by a court of competent jurisdiction has resulted in a remand for resentencing; or

(3) Before the court alone, if a jury sentencing proceeding is waived by the defendant.

(c) Evidence; argument; instructions. -- (1) The following type of evidence is admissible in this proceeding:

(i) Evidence relating to any mitigating circumstance listed in subsection (g) of this section;

(ii) Evidence relating to any aggravating circumstance listed in subsection (d) of this section of which the State had notified the defendant pursuant to Section 412(b);

(iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures;

(iv) Any presentence investigation report. However, any recommendation as to sentence contained in the report is not admissible; and

(v) Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements.

(2) The State and the defendant or his counsel may present argument for or against the sentence of death.

(3) After presentation of the evidence in a proceeding before a jury, in addition to any other appropriate instructions permitted by law, the court shall instruct the jury as to the findings it must make in order to determine whether the sentence shall be death or imprisonment for life and the burden of proof applicable

to these findings in accordance with subsection (f) or subsection of (h) of this section.

(d) Consideration of aggravating circumstances. -- In determining the sentence, the court or jury, as the case may be, shall first consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer who was murdered while in the performance of his duties.

(2) The defendant committed the murder at a time when he was confined in any correctional institution.

(3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

(4) The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

(5) The victim was a child abducted in violation of § 2 of this article.

(6) The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

(7) The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

(8) At the time of the murder, the defendant was under sentence of death or imprisonment for life.

(9) The defendant committed more than one offense of murder in the first degree arising out of the same incident.

(10) The defendant committed the murder while committing or attempting to commit a robbery, arson, rape, or sexual offense in the first degree.

(e) Definitions. -- As used in this section, the following terms have the meanings indicated unless a contrary meaning is clearly intended from the context in which the term appears:

(1) The terms "defendant" and "person", except as those terms appear in subsection (d)(7), include only a principal in the first degree.

(2) The term "correctional institution" includes any institution for the detention or confinement of persons charged with or convicted of a crime, including Patuxent Institution, any institution for the detention or confinement of juveniles charged with or adjudicated as being delinquent, and any hospital in which the person was confined pursuant to an order of a court exercising criminal jurisdiction.

(3) The term "law enforcement officer" has the meaning given in § 727 of Article 27. However, as used in subsection (d), the term also includes (i) an officer serving in a probationary status, (ii) a parole and probation officer, and (iii) a law enforcement officer of a jurisdiction outside of Maryland.

(f) Finding that no aggravating circumstances exist. -- If the court or jury does not find, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall state that conclusion in writing, and the sentence shall be imprisonment for life.

(g) Consideration of mitigating circumstances. -- If the court or jury finds, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall then consider whether, based upon a preponderance of the evidence, any of the following mitigating circumstances exist:

(1) The defendant has not previously (i) been found guilty of a crime of violence, (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in

the commission of a felony or another crime of violence.

(2) The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(3) The defendant acted under substantial duress, domination or provocation of another person, but no so substantial as to constitute a complete defense to the prosecution.

(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

(5) The youthful age of the defendant at the time of the crime.

(6) The act of the defendant was not the sole proximate cause of the victim's death.

(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case.

(h) Weighing mitigating and aggravating circumstances. -- (1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.

(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.

(3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life.

(i) Determination to be written and unanimous. -- The determination of the court or jury shall be in writing, and, if a jury, shall be unanimous and shall be signed by the foreman.

(j) Statements required in determination. -- The determination of the court of jury shall state, specifically:

(1) Which, if any, aggravating circumstances it finds to exist;

(2) Which, if any, mitigating circumstances it finds to exist;

(3) Whether any mitigating circumstances found under subsection (g) outweigh the aggravating circumstances found under subsection (d);

(4) Whether the aggravating circumstances found under subsection (d) are not outweighed by mitigating circumstances found under subsection (g); and

(5) The sentence, determined in accordance with subsection (f) or (h).

(k) Imposition of sentence. -- (1) The court shall impose the sentence determined by the jury under subsection (f) or (h).

(2) If the jury, within a reasonable time is not able to agree as to sentence, the court shall dismiss the jury and impose a sentence of imprisonment for life.

(3) If the sentencing proceeding is conducted before a court without a jury, the court shall impose the sentence determined under subsection (f) or (h).

(l) Rules of procedure. -- The Court of Appeals may adopt rules of procedure to govern the conduct of a sentencing proceeding conducted pursuant to this section, including any forms to be used by the court or jury in making its written findings and determinations of sentence.

Section 414. Automatic review of death sentences.

(a) Review by Court of Appeals required. -- Whenever the death penalty is imposed, and the judgment becomes final, the Court of Appeals shall review the sentence on the record.

(b) Transmission of papers to Court of Appeals. -- The clerk of the trial court shall transmit to the Clerk of the Court of Appeals the

entire record and transcript of the sentencing proceeding within ten days after receipt of the transcript by the trial court. The clerk also shall transmit the written findings and determination of the court or jury and a report prepared by the trial court. The report shall be in the form of a standard questionnaire prepared and supplied by the Court of Appeals of Maryland and shall include a recommendation by the trial court as to whether or not imposition of the sentence of death is justified in the case.

(c) Briefs and oral argument. -- Both the State and the defendant may submit briefs and present oral argument within the time provided by the Court.

(d) Consolidation of appeals. -- Any appeal from the verdict shall be consolidated in the Court of Appeals with the review of sentence.

(e) Considerations by Court of Appeals. --In addition to the consideration of any errors properly before the Court on appeal, the Court of Appeals shall consider the imposition of the death sentence. With regard to the sentence, the Court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether the evidence supports the jury's or court's finding of a statutory aggravating circumstance under § 413 (d);

(3) Whether the evidence supports the jury's or court's finding that the aggravating circumstances are not outweighed by mitigating circumstances; and

(4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(f) Decision of Court of Appeals. -- (1) In addition to its review pursuant to any direct appeal, with regard to the death sentence, the Court shall:

(i) Affirm the sentence;

(ii) Set aside the sentence and remand the case for the conduct of a new sentencing proceeding under § 413; or

(iii) Set aside the sentence and remand for modification of the sentence to imprisonment for life.

(2) The Court shall include in its decision a reference to the similar cases which it considered.

(g) Rules of procedure. -- The Court may adopt rules of procedure to provide for the expedited review of all death sentences pursuant to this section.

RULES INVOLVED

Maryland Rule 4-343:

Rule 4-343. Sentencing -- Procedure In Capital Cases.

(a) Applicability. -- This Rule applies whenever sentence is imposed under Code, Article 27, Sec. 413.

(b) Statutory Sentencing Procedure. -- When a defendant has been found guilty of murder in the first degree and the State has given the notice required under Code, Article 27, Sec. 412(b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial pursuant to the provisions of Code, Article 27, § 413.

(c) Judge. -- Except as provided in Rule 4-361, the judge who presides at trial shall preside at the sentencing proceeding.

(d) Allocution. -- Before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement.

(CAPTION)

FINDINGS AND SENTENCING DETERMINATION

Section I

Based upon the evidence, we unanimously find that each of the following aggravating circumstances that is marked "yes" has been proven BEYOND A REASONABLE DOUBT. Each

of the aggravating circumstances that has not been so proven is marked "no."

1. The victim was a law enforcement officer who was murdered while in the performance of the officer's duties.

Yes No

2. The defendant committed the murder at a time when confined in a correctional institution.

Yes No

3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

Yes No

4. The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

Yes No

5. The victim was a child abducted in violation of Code, Article 27, Sec. 2.

Yes No

6. The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

Yes No

7. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

Yes No

8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.

Yes No

9. The defendant committed more than one offense of murder in the first degree arising out of the same incident.

Yes No

10. The defendant committed the murder while committing or attempting to commit robbery, arson, rape in the first degree or sexual offense in the first degree.

Yes No

(If one or more of the above are marked "yes," complete Section II. If all of the above are marked "no," do not complete Sections II and III.)

Section II

Based upon the evidence, we unanimously find that each of the following mitigating circumstances that is marked "yes" has been proven to exist by A PREPONDERANCE OF THE EVIDENCE. Each mitigating circumstances that has not been so proved is marked "no."

1. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, mayhem, murder, robbery, rape in the first or second degree, sexual offense in the first or second degree, manslaughter other than involuntary manslaughter, an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

The defendant previously (i) has not been found guilty of a crime of violence; and (ii) has not entered a plea of guilty or nolo contendere to a charge of a crime of violence; and (iii) has not been granted probation on stay of entry of judgment pursuant to a charge of a crime of violence.

Yes No

2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

Yes No

3. The defendant acted under substantial duress, domination, or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

Yes No

4. The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

Yes No

5. The defendant was of a youthful age at the time of the crime.

Yes No

6. The act of the defendant was not the sole proximate cause of the victim's death.

Yes No

7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

Yes No

8. Other facts specifically set forth below constitute mitigating circumstances:

Yes No

_____
_____
_____
_____
(Use reverse side if necessary)

(If one or more of the above in Section II have been marked "yes," complete Section III. If all of the above in Section II are marked "no," do not complete Section III.)

Section III

Based on the evidence, we unanimously find that it has been proven by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked "yes" in Section II outweigh the aggravating circumstances marked "yes" in Section I.

Yes No

DETERMINATION OF SENTENCE

Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instructions:

1. If all of the answers in Section I are marked "no," enter Life Imprisonment."

2. If Section III was completed and was marked "yes," enter "Life Imprisonment."

3. If Section II was completed and all of the answers were marked "no," then enter "Death."

4. If Section III was completed and was marked "no," enter "Death."

We unanimously determine the sentence to be_____

_____ Foreman

_____ Juror 2

_____ Juror 3

_____ Juror 4

_____ Juror 5

_____ Juror 6

_____ Juror 7

_____ Juror 8

_____ Juror 9

_____ Juror 10

_____ Juror 11

_____ Juror 12

or, _____ JUDGE

(f) Advice of the Judge. -- At the time of imposing sentence, the judge shall advise the defendant of the right of appeal and the time allowed for the exercise of this right. The judge shall also advise a defendant who receives a sentence of death that (1) the sentence only will be reviewed automatically by the Court of Appeals, and (2) the sentence will be stayed pending review of the sentence by the Court of Appeals and any appeal which the defendant may take.

(g) Report of Judge. -- After sentence is imposed, the judge promptly shall prepare and send to the parties a report in the following form:

(CAPTION)

REPORT OF TRIAL JUDGE

I. Data Concerning Defendant

A. Date of Birth
B. Sex
C. Race
D. Address
E. Length of Time in Community
F. Reputation in Community
G. Family Situation and Background
   1. Situation at time of offense (describe defendant's living situation including marital status and number and age of children)
   2. Family history (describe family history including pertinent data about parents and siblings
H. Education
I. Work Record
J. Prior Criminal Record and Institutional History (list any prior convictions, disposition, and periods of incarceration)
K. Military History
L. Pertinent Physical or Mental Characteristics or History
M. Other Significant Data About Defendant

II. Data Concerning Offense

A. Briefly describe facts of offense (include time, place, and manner of death; weapon, if any; other participants and nature of participation)
B. Was there any evidence that the defendant was under the influence of alcohol or drugs at the time of the offense? If so describe.

C. Did the defendant know the victim prior to the offense?
   Yes_____ No_____
   1. If so, describe relationship.
   2. Did the prior relationship in any way precipitate the offense? If so, explain.
D. Did the victim's behavior in any way provoke the offense? If so, explain.
E. Data Concerning Victim
   1. Name
   2. Date of Birth
   3. Sex
   4. Race
   5. Length of time in community
   6. Reputation in community
F. Any Other Significant Data About Offense

III. A. Plea Entered by Defendant:
Not guilty____; guilty____; not guilty by reason of insanity ____
B. Mode of Trial:
Court_____ Jury_____
If there was a jury trial, did defendant challenge the jury selection or composition? If so, explain.
C. Counsel
   1. Name
   2. Address
   3. Appointed or retained
   (If more than one attorney represented defendant, provide data on each and include stage of proceeding at which the representation was furnished.)
D. Pre-Trial Publicity -- Did defendant request a mistrial or a change of venue on the basis of publicity? If so, explain. Attach copies of any motions made and exhibits filed.
E. Was defendant charged with other offenses arising about of the same incident? If so, list charges; state whether they were tried at same proceeding, and give disposition.

IV. Data Concerning Sentencing Proceeding

A. List aggravating circumstance(s) upon which State relied in the pretrial notice.
B. Was the proceeding conducted
before same judge as trial? _____
before same jury? _____
If the sentencing proceeding was conducted before a jury other than the trial jury, did the defendant challenge the selection or composition of the jury? If so, explain.

C. Counsel -- If counsel at sentencing was different from trial counsel, give information requested in III C above.
D. Which aggravating and mitigating circumstances were raised by the evidence?
E. On which aggravating and mitigating circumstances were the jury instructed?
F. Sentence imposed: Life imprisonment
Death

V. Chronology
Date of Offense
Arrest
Charge
Notification of intention to seek penalty of death
Trial (guilt/innocence) -- began and ended
Post-trial Motions Disposed Of
Sentencing Proceeding -- began and ended
Sentence Imposed

VI. Recommendation of Trial Court As To Whether Imposition of Sentence of Death is Justified.

VII. A copy of the Findings and Sentencing Determination made in this action is attached to and made a part of this report.

_____
Judge

CERTIFICATION

I certify that on the _____ of _____, 19____ I sent copies of this report to counsel for the parties for comment and have attached any comments made by them to this report.

_____
Judge

Within five days after receipt of the report, the parties may submit to the judge written comments concerning the factual accuracy of the report. The judge promptly shall file with the clerk of the trial court, and in the case of a life sentence with the Clerk of the Court of Appeals the report in final form, noting any changes made, together with any comments of the parties.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

NO. 85-6648

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN NORMAN HUFFINGTON,

Petitioner

v.

STATE OF MARYLAND,

Respondent

BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Whether the Maryland Court of Appeals has consistently interpreted the Maryland Death Penalty Statute so as to avoid offending the Eighth and Fourteenth Amendments to the United States Constitution; and whether the allocation of the burden and standard of proof in the Maryland Death Penalty Statute is constitutional?

2. Whether exclusion of the transcribed testimony of an unavailable witness, inadmissible as former testimony, comports with the law of evidence and federal due process?

3. Whether Maryland's statutory form indictment for murder sufficiently charged Petitioner with first degree murder?

NO. 85-6648

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN NORMAN HUFFINGTON,

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v.

STATE OF MARYLAND,

Respondent

BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The State of Maryland, Respondent, by its attorneys, Stephen H. Sachs, Attorney General of Maryland and Deborah K. Chasanow, Assistant Attorney General, submits that the Petition for Writ of Certiorari should be denied, no substantial federal question having been presented in the Petition.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case.

REASONS FOR DENYING THE WRIT

I.

THE RECENT CLARIFICATION OF THE OPERATION OF THE MARYLAND CAPITAL SENTENCING STATUTE DOES NOT CONSTITUTE A CHANGE IN THE LAW AND FIRMLY ESTABLISHES THE CONSTITUTIONALITY OF THE ALLOCATION OF THE BURDEN OF PERSUASION.

Petitioner contends that the Maryland Court of Appeals, through announcing its decision in Foster v. State, 304 Md. 439, 499 A.2d 1236 (1985), violated both the Fourteenth Amendment to the United States Constitution by rendering the Maryland Capital Punishment Statute "unduly vague with respect to those persons convicted prior to the reconstruction," (Petition p.16), and the Eighth Amendment to the United States Constitution by rendering "the imposition of the death penalty on some persons arbitrary and capricious." (Petition p.17). In support of these claims, Petitioner contends that the Maryland Court of Appeals' decision in Foster constituted a "reconstruction" of the statute which varied the burden of persuasion from that employed in Petitioner's case. He contends that the procedure employed in his case placed the ultimate burden of persuasion upon him with regard to obtaining a life sentence, instead of death. However, a review of the Maryland Court of Appeals opinion in Foster, together with prior decisions interpreting Art. 27, §413 of the Maryland Annotated Code, reflects that the Foster opinion did not change the law. Rather, the opinion restated that which had been pronounced in Tichnell v. State, 287 Md. 695, 730, 415 A.2d 830 (1980), the first decision rendered by the

Court of Appeals under the current death penalty statute. As the law never changed, there was no unconstitutional vagueness, arbitrariness or capriciousness, or improper allocation of burden. As a result, review is unwarranted.[1]

In Tichnell v. State, 287 Md. at 730, 415 A.2d at 849, the Maryland Court of Appeals stated:

> "Because the State is attempting to establish that the imposition of the death penalty is an appropriate sentence, the statute places the risk of nonpersuasion on the prosecution with respect to whether the aggravating factors outweigh the mitigating factors."

This holding was reiterated by the court in Trimble v. State, 300 Md. 387, 415 n.16, 478 A.2d 1143, 1157 n.16 (1984), cert. denied, ___ U.S. ___, 105 S.Ct. 1231, 84 L.Ed.2d 368 (1985), where it stated:

> "In Tichnell I, we also construed Section 413(h)(2), which provides that the trier of fact shall determine whether 'the mitigating circumstances outweigh the aggravating circumstances,' to place the burden of persuasion on the prosecution."

The holding of the Court of Appeals in Foster v. State, supra, did not constitute a deviation from this previously announced law. Rather, the Court merely reiterated that when

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[1] Petitioner's challenge relates solely to the facial validity of the Maryland capital punishment statute. As noted by the Maryland Court of Appeals in its decision on Motion for Reconsideration, Foster, et al. v. State, 305 Md. 306, (1986), any challenge to the instructions has been waived under State law for failure to raise the issue at trial or on direct appeal. It is clear that Petitioner would have been entitled to an instruction informing the jury that in weighing aggravating and mitigating circumstances, if there were an even balance, the sentence should be life, had one been requested.

evidence is weighed, no burden is imposed upon either party. In this ultimate balance, if the aggravating factors outweigh the mitigating factors the sentence is death; if the mitigating factors outweigh the aggravating factors, the sentence is life; if the mitigating factors and aggravating factors are in a state of even balance, the appropriate sentence is life because the State (as the moving party) bears the risk of nonpersuasion.[2] As there was no deviation from existing law, the Maryland Capital Punishment Statute is not overly vague in contravention of the Fourteenth Amendment, and does not result in the arbitrary and capricious imposition of

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[2] In support of his contention under the Fourteenth Amendment, Petitioner cites Ashton v. Kentucky, 384 U.S. 195 (1966), and Hicks v. Oklahoma, 447 U.S. 343 (1980) for the proposition that a limiting construction cannot be applied to affirm the decision in the case in which the limitation was announced. The flaw in Petitioner's contention, aside from the fact that there was no reconstruction here, however, is that the Ashton restriction applies only where the new interpretation saves that which would have been unconstitutional. Assuming that the Foster decision transferred the burden of persuasion to the State, there remains no infirmity as imposing the burden on the defendant is not unconstitutional. See Proffitt v. Florida, 428 U.S. 242 (1976) (scheme in which death is presumed after one or more aggravating circumstances is found unless overridden by mitigating factors constitutional). Cf. Patterson v. New York, 432 U.S. 197 (1977).

sentence in violation of the Eighth Amendment.[3] There is simply nothing in the reiteration of prior holdings in the Foster opinion that would serve to violate the Federal Constitution.

Petitioner additionally contends that review of his case is warranted because he was tried under the interpretation of the law that existed prior to the Foster decision, an interpretation that he alleges is unconstitutional. However, as noted above, Foster did not initiate any change in the law. It was the law from the time of the first decision under the existing statute. As a result, his contention on this basis must be rejected.

He further asserts that even if the burden were properly allocated to the State, the statute is nevertheless unconstitutional because the ultimate weighing does not require a finding "beyond a reasonable doubt." However, Petitioner once again erroneously talks in terms of burden with respect to a weighing of one set of circumstances against another. As

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[3] Petitioner's reliance upon Bouie v. City of Columbia, 378 U.S. 347 (1964), in asserting that at the time he was sentenced (prior to Foster) the statute was unconstitutionally vague is misplaced. In Bouie, the South Carolina appellate court expanded the definition of the trespass statute beyond its specific terms in order to find the evidence sufficient in Bouie's case. Here, on the other hand, the judicial interpretation was not contrary to the legislative enactment. See Stebbing v. Maryland, ___ U.S. ___, 105 S.Ct. 276, 280, 83 L.Ed.2d 212, 217 (1984) (Marshall, J., dissenting on denial of certiorari) (Maryland statute is silent as to burden on ultimate weighing). Moreover, the South Carolina courts had never interpreted the trespass statute to include Bouie's conduct until after Bouie's arrest. The Maryland Court of Appeals, on the other hand, had interpreted the statute with respect to burdens prior to Petitioner's trial.

noted by the Maryland Court of Appeals, "ordinarily in such a balancing process, a court simply determines which side outweighs the other, without being concerned with how much or how clearly one side may outweigh the other." Foster v. State, 304 Md. at 477. The Court of Appeals had earlier rejected an identical contention in Tichnell v. State, 287 Md. at 732-733, 415 A.2d at 849-850, relying upon this Court's decision in Patterson v. New York, 432 U.S. 197 (1977). In Patterson, this Court

> "decline[d] to adopt as a constitutional imperative, operative country wide, that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch." 432 U.S. at 209-10.

Under the Maryland scheme, the State is required to prove beyond a reasonable doubt that the defendant is guilty of first degree murder, that he was a principal in the first degree or contracted for the murder of another, and that at least one aggravating factor is present. The defendant is then provided an opportunity to present evidence to help the jury find the existence of any mitigating factor established

by a preponderance of the evidence.[4] It is then up to the sentencer to weigh the evidence in aggravation against the mitigating factors found to exist under a preponderance standard in order to determine the ultimate sentence. There is no unconstitutional allocation of burden or standard in this scheme. As a result, review of the first two contentions presented by Petitioner is unwarranted.

II.

THE MARYLAND COURT'S DECISION THAT THE TRANSCRIBED TESTIMONY OF STEPHEN RASSA WAS INADMISSIBLE AS FORMER TESTIMONY COMPORTS WITH WELL ESTABLISHED EVIDENTIARY LAW AND FEDERAL DUE PROCESS.

Petitioner's co-defendant, Deno Kanaras, was separately tried. The State did not seek the death penalty in the Kanaras case, apparently due to a lack of evidence that he was a principal in the first degree to the murder of either victim Hudson or Becker. The evidence against Kanaras consisted primarily of the latter's admission that he was an eyewitness and participant in the events culminating in the homicides. Kanaras claimed, however, that he was an unwilling participant whose presence and assistance was induced by the threats from

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[4] The defendant has no obligation to produce evidence or prove mitigating factors. As stated in Foster, 304 Md. at 474, 499 A.2d at 1254: "[R]egardless of what evidence a defendant himself may or may not produce, or regardless of any mitigation argument he may or may not advance, if the jury perceives from the case a fact or circumstance concerning the crime or the defendant, which the jury deems to be mitigating, it may treat it as such. As to mitigation, it is only the risk of non-production or non-persuasion which the defendant bears."

Petitioner, who was armed with a gun. In that trial the jury acquitted Kanaras of any criminal involvement in Hudson's death, but convicted him of felony murder, daytime housebreaking, and theft relating to the murder of Becker. See, Kanaras v. State, 54 Md. App. 568, cert. denied, 297 Md. 109 (1983).

At the Kanaras trial, the State called four rebuttal witnesses to refute certain accounts of the events given by Kanaras and to rebut his credibility with regard to the claim of duress. One of these was an acquaintance named Stephen Rassa. In offering Rassa's testimony, the State proffered that he would testify that a week prior to the murders, Rassa had to dissuade Kanaras from robbing Hudson and stealing his cocaine. Id. at 589. The trial court only allowed the jury in the Kanaras case to consider Rassa's testimony on the issue of credibility, and not as substantive evidence of guilt. In approving the admission of the Rassa testimony and that of other rebuttal witnesses on appeal, the Court of Special Appeals pointed out that the central issue in the killings was drugs and that it was important for the State to show "...that Kanaras both needed and lusted for money and participated in prior drug transactions, and may have specifically considered robbing Hudson." Id. at 595.

At the Kanaras trial Rassa testified that he and Kanaras were together one day about a week prior to the murders. He and Kanaras went to Hudson's trailer to buy cocaine. Rassa was nervous because he had had a prior undisclosed

conversation with Kanaras about Hudson and Becker. Kanaras went to get his gun prior to entering the Hudson trailer. When asked, Kanaras told Rassa that he was going to show Rassa the gun. Rassa asked Kanaras if he could shoot and rob someone or stab someone in daylight, and Kanaras allegedly answered in the negative, but suggested that Rassa could do so. The two men then completed a cocaine sale with Hudson without mishap. On cross-examination Rassa admitted that he, not Kanaras, first brought up the subject of robbing and killing Hudson.

In the middle of Rassa's cross-examination, a recess was called in the Judge's Chambers to determine Rassa's mental competency to testify. Kanaras' attorney moved for a psychiatric examination, and asked that the State be required to produce any pscyhiatric records it had or could obtain. The trial judge made several highly unusual observations. He opined that Rassa's whole demeanor on the witness stand raised serious questions in the judge's mind as to Rassa's credibility and noted that if he were the trier of fact he wouldn't "pay a bit of attention" to Rassa's testimony. Apparently this was because of Rassa's peculiar and delayed manner of answering questions. The judge noted that he didn't know if Rassa was thinking up a lie or was mentally impaired. Rassa was called into chambers and questioned on the extent of his prior drug use. When he resumed the stand, Rassa admitted to use of PCP two weeks prior to the Kanaras trial and LSD three months prior, as well as the prior

extended use of those two drugs, marijuana, cocaine, hashish, amphetamines and tranquilizers. Even though the judge had opined that Rassa's demeanor "destroys his credibility as far as I'm concerned", he concluded the jurors were people of common sense and could arrive at that conclusion on their own.

At Petitioner's subsequent trial, his defense counsel moved that the Court admit Rassa's transcribed rebuttal testimony from the Kanaras trial under the former testimony exception to the hearsay rule.[5] Petitioner's defense proffered that the testimony would demonstrate to the jury that Rassa had to stop Kanaras from killing the victims a week prior to their actual murder. The State disputed such characterization, proffering that the testimony showed only that Kanaras had attempted to recruit someone to commit a robbery, consistent with the State's theory of the crime. The Court denied use of the transcript on the ground that Rassa had been a State's witness at the Kanaras trial involving a different defendant and the State had had no opportunity to fully cross-examine Rassa upon the issue which the defense sought to prove. The Court of Appeals affirmed, on the ground that, under the circumstances of this case, the Rassa transcript did not qualify for admission as former testimony due to the State's lack of opportunity to examine Rassa with regard to the issue Petitioner sought to prove with the testimony at his subsequent trial.

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[5]The actual transcript was never offered to the trial judge, but was added to the record on appeal to the Court of Appeals.

Petitioner states that the issue presented for this Court's review is whether he was deprived of his constitutional right to due process and compulsory process by the Maryland Court's decision to exclude the Rassa testimony. This ignores the fact that these constitutional arguments were simply not presented to the trial judge. Rather, Petitioner argued at trial that the Rassa testimony should be admitted under the evidentiary law relating to former testimony, as previously set forth. On appeal before the Court of Appeals, Petitioner did set forth several grounds in support of his allegation that admission of the transcript had been erroneously denied, including an assertion that the ruling denied him due process. Respondent asserted before that Court that the constitutional claim had not been presented to the trial judge when the Petitioner sought admission of the evidence, and was not preserved for review on direct appeal under Maryland law. See, Maryland Rule 885 (Appellate Court will ordinarily not decide any point or question not tried or decided in trial court). Maryland Rule 885 has been applied by the Maryland Court of Appeals in numerous death penalty cases, notwithstanding that Court's observation that it will be less strictly applied in such cases. Foster, Evans & Huffington v. State, 305 Md. 306, 318 (1986) (on Motions For Reconsideration); Thomas v. State, 301 Md. 294, 330 (1984); Calhoun v. State, 297 Md. 563, 601 (1983); Johnson v. State, 292 Md. 405, 412 n.3 (1982). Further, it is a well established principle of Maryland Law

that where counsel has presented a specific but different ground for admission of evidence at trial, he will be held to those grounds and all others not specified are considered waived. von Lusch v. State, 279 Md. 255, 263 (1977); Thomas v. State, supra.

In this case the Court of Appeals found, as a matter of evidentiary law, that the Rassa testimony did not qualify for admission against the State under the former testimony exception to the hearsay rule. However, it did not address Petitioner's due process claim. As the Maryland appellate court declined to address the constitutional issue, it must be assumed that that Court did not view the issue properly preserved under the aforestated well established procedural law. Accordingly, Petitoner's constitutional claim is not preserved for direct review to this Court based on this independent procedural ground. Hess v. Indiana, 414 U.S. 105, 106 n.2 (1973); Wardius v. Oregon, 412 U.S. 470, 477 n.10 (1973); Moore v. Illinois, 408 U.S. 786, 799 (1972); Wainwright v. Sykes, 433 U.S. 72, 87 (1977), citing Henry v. Mississippi, 379 U.S. 443 (1965).

Additionally, it is a well established principle of federalism that this Court will not review a State decision resting on adequate and independent substantive State law. Wainwright v. Sykes, supra, at 81, citing Fox Film Corp. v. Muller, 296 U.S. 207 (1935), and Murdock v. Memphis, 20 Wall 590, 22 L.Ed. 429 (1875). This principle includes State decisions founded on State evidentiary law. Moore v.

Illinois, supra. In this case the Court of Appeals applied the common law of evidence, as established in its prior cases, scholarly authorities, and the Federal Rules relating to the admissibility of former testimony of an allegedly unavailable witness. Specifically, the Maryland Court of Appeals applied the well established requirement that the party against whom the prior testimony is offered, and who is deprived of the opportunity for cross-examination, must have had a similar motive and purpose to develop the testimony at a prior proceeding, such that the prior examination of the witness was a fair equivalent of what it would have been in the subsequent proceeding. That is a specific requirement of Federal Rule 804(b)(1), providing for admission of former testimony in federal cases, and decisons that have interpreted it. See, United States v. Adkins, 618 F.2d 366 (5th Cir. 1980); Peterson v. United States, 344 F.2d 419 (1965). See also, Commonwealth v. Meech, 403 N.E.2d 1174, 1175-1178 (Mass. 1980); Crawford v. State, 282 Md. 210 (1978); Yellow Cab Co. v. Henderson, 183 Md. 546, 556 (1944); Brooks v. State, 35 Md. App. 461, 469-470 (1961); McCormick, Evidence, §255-257 (3rd.Ed. 1984); Wigmore on Evidence, §1386-7 (Chadbourn Rev. Ed. 1974). This requirement of the hearsay exception insures that the hearsay as used is reliable and promotes a fair hearing for both parties. Further, the restriction may be invoked on behalf of the government in a criminal case, as well as on behalf of the accused. As stated by the Fifth Circuit Court of Appeals in Atkins, supra, at 373, the

criminal accused may not use testimony which the government elicited on a different issue at a prior hearing to prove, by implication, a defense issue which the government could well have refuted had it developed the testimony with the later issue in mind.

Here the Maryland Court of Appeals held that Rassa's testimony at the Kanaras trial had been developed and admitted on an entirely different issue than that for which it was offered at Petitioner's trial. At the Kanaras trial, the State sought only to refute Kanaras' denials that he was involved in drugs and needed money. The rebuttal testimony was relative to his intent and motive, as he claimed duress. It was not admitted as substantive evidence of his guilt, but only on the issue of his credibility. It was thus obviously not introduced to prove that Kanaras was the person who actually killed the victims Becker and Hudson, as principal in the first degree, to the exclusion of Petitioner. That was never the State's theory of the offense, as best evidenced by the fact that the State did not seek the death penalty in the Kanaras case. Thus, the State's motive during its examination of Rassa was not the fair equivalent of what it would have been on the issue which Petitioner sought to disprove at his own trial: that he was the principal in the first degree in the murders, either alone or with Kanaras' participation.

Even if Petitioner had presented the due process challenge to exclusion of the Rassa transcript as former testimony, that assertion lacks merit. Respondent recognizes

that in unique circumstances this Court has held that due process may require admission of crucial but reliable defense evidence in a criminal case, even though such evidence is not admissible under State evidentiary law. Chambers v. Mississippi, 410 U.S. 284 (1973); Green v. Georgia, 442 U.S. 95 (1979). In Chambers this Court recognized that in very limited situations the due process clause is offended when hearsay prohibitions are applied "mechanistically to defeat the ends of justice." Id. at 302. However, this Court expressesly noted that the hearsay rule is recognized and applied in virtually every State and "...grounded in the notion that untrustworthy evidence should not be presented to the triers of fact..." Id.at 298. Accordingly, the Chambers decision did not establish a new principle of constitutional law or "...signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." Id. at 303. In both Chambers and Green v. Georgia, supra, the State Courts excluded, on the basis of evidentiary law, third party confessions to the murders for which those defendants were accused. The confessions were made shortly after the murders occurred, spontaneously to friends of the confessing parties. The confessions bore "persuasive assurances of trustworthiness" and reliability, and were critical to the defense. The hearsay statements were clearly against interest. In Chambers, the third party confession was extensively corroborated as well, but found inadmissible in

part due to Georgia's nonrecognition of the hearsay exception for declarations against penal interest. Chambers v. Mississippi, supra at 298-300. The Maryland Court of Appeals has previously applied the principle of Chambers and Green in capital cases where appropriate. See, Foster v. State, 297 Md. 191 (1983).

Here, the Rassa testimony involved no confession to the crime. It was nothing more than Rassa's impression that Kanaras intended a robbery a week prior to the killings, which was wholly consistent with the State's theory of the case. According to Rassa, he initiated and subjectively interpreted the entire conversation. His testimony was not independently corroborated. Most importantly, however, it was inherently unreliable and untrustworthy in the form of a transcript, in light of Rassa's apparent drug related mental impairment, a factor which could obviously only be assessed by a live viewing of his demeanor on the witness stand. The comments of the judge at the Kanaras trial made clear that, but for the jury's ability to view Rassa's remarkable manner of testifying in order to assess his veracity, his testimony might have been entirely struck as being unreliable as Kanaras' defense counsel had requested. The State's Attorney agreed with the judge on that point. Thus, the former Rassa testimony, in the form of a cold transcript, was inherently untrustworthy. For all of these reasons, this issue does not warrant the review by this Court.

III.

MARYLAND STATUTORY INDICTMENT FORM SUFFICIENTLY CHARGED PETITIONER WITH FIRST DEGREE MURDER.

As a third basis for review, Petitioner alleges that Maryland's statutory short form indictment charging first degree murder was inadequate, as a matter of due process, to charge him with the crime of felony murder. He was charged in the language set forth by the Maryland Legislature at Maryland Code Annotated, Art. 27 §616. In accordance with that statute, the grand jury charged that Petitioner "...unlawfully, willfully and of deliberately premeditated malice aforethought did kill and murder..." Becker and Hudson. Following the statutory language, each indictment cited: ("Murder, First Degree Art. 27, §407, 410, 413, 616.") Maryland Code Annotated Art. 27 §410 declares that murder committed in the course of certain enumerated felonies, including robbery and daytime housebreaking, shall be murder in the first degree.

Petitioner's constitutional challenge to Maryland's short form indictment for murder, though meritless, has been waived for appellate review under Maryland's procedural law. Petitioner failed to challenge the indictment in accordance with Maryland Rule of Procedure 4-252(a), (former Maryland Rule 736a) which mandatorily requires that certain motions be made thirty days after a defendant's first appearance in court or the entry of counsel's appearance, including those charging "[a] defect in the charging document other than its failure to

show jurisdiction in the court or its failure to charge an offense." See also, Williams v. State, 302 Md. 787 (1985). Accordingly, the Maryland Court of Appeals expressly held that Petitioner had waived any constitutional challenge to the indictment. [Appendix p. 27]. That Court's ruling presents an independent and adequate State procedural waiver barring review of the issue by this Court, based on the authority previously set forth herein in Argument II, supra. The Maryland procedural requirement is obviously necessary to promote the interests of judicial economy, speedy trial, and fairness to the State. When such challenges are made prior to trial, indictments may be newly drawn or amended where necessary. Indeed, if Petitoner's allegation that he has not been charged with felony murder were true, the State could now reindict him for what he erroneously alleges to be a separate offense, thus requiring, unnecessarily, a belated retrial. Thus, this Court should decline, as did the Maryland Appeals Court, to address the issue now.

Even if the due process allegation had been properly preserved by Petitioner, the language in the Maryland short form indictment for murder has long been established as sufficient to charge all species of murder, including felony murder, under Maryland case law. Contrary to Petitioner's assertion, the Maryland appellate courts have not recognized two forms of first degree murder. Rather, murder as developed in Maryland common law was a single crime. When the General Assembly enacted statutes dividing that common law crime into

degrees, and enacted the specific statute making murder in the course of enumerated felonies first degree murder, it did not intend, as interpreted by the Maryland Court of Appeals, to create new or separate crimes of murder. Rather, the Maryland murder statutes merely provide mitigation for second degree murders and a number of species of first degree murder, including felony murder. Wood v. State, 191 Md. 658, 666-667 (1948); Hardy v. State, 301 Md. 124, 137 (1984).

The term "murder" has been defined in the English and Maryland case law as a killing with "malice aforethought". Wood v. State, supra. Actually, though, malice is the mens rea of murder and includes four possible species under Maryland law -- 1. an express intent to kill; 2. an intent to do grevious bodily harm; 3. an intent to do a wantonly life endangering act; and 4. an intent to commit a dangerous felony. Evans v. State, 28 Md. App. 640, 701 (1975), aff'd. 278 Md. 197 (1976). The term "malice aforethought" has thus evolved as a term of art including any or all of these species of the mens rea element of murder. Wood v. State, supra. Additionally, "willful, deliberate and premeditated" has so dominated the literature and case law relating to common law murder, that it has become the "universal statement of the offense." Evans v. State, supra.

Based on this analysis of the law of murder, the Maryland Court has determined that an indictment in the language here used, as sanctioned by the Maryland Legislature, is sufficient to charge all types of murder. Wood v. State, supra at 667;

Robinson v. State, 298 Md. 193, 201-202 (1983). This Court has held that whether or not a State indictment is sufficient to charge the crime of murder under the law of that State is an issue for the State court to determine. Kohl v. Lehlback, 160 U.S. 293 (1895); Bergemann v. Backer, 157 U.S. 655, 659 (1985). Justice Harlan, writing for this Court in the Bergemann case, held that a New Jersey statutory form indictment for murder utilizing language similar to Maryland's short form, was sufficient to charge all species of murder based on a state law interpretation of the common law similar to that previously applied by the Maryland Court of Appeals. Bergemann v. Backer, supra at 658-659.

Additionally, the indictments in Petitioner's case specifically set forth the statutory sections upon which the State intended to rely to show first degree murder, including a section relating to felony murder. Obviously, in light of all of the above, due process was not violated because Petitioner was fully advised of the crime with which he was charged and, was not subject to future prosecutions arising out of the same murders. See, United States v. Miller, 105 S.Ct. 1911, 1914, 85 L.Ed.2d 99 (1985).

Numerous state and federal cases have addressed this precise issue and concluded that language similar to that employed in the Maryland indictment is sufficient to charge felony murder. See, Blake v. Morford, 563 F.2d 248 (6th Cir. 1977); Bizup v. Tinsley, 211 F.Supp. 545 (D. Col. 1962), aff'd.,316 F.2d 284 (10th Cir. 1963), mandamus and other

relief denied, 375 U.S. 990 (1964); People v. Murtishaw, 29 Cal. 3rd 733, 175 Cal. Rptr. 738, 631 P.2d 46, 455 n.11 (1981), cert. denied, 455 U.S. 922 (1982). See also, State v. Stephens, 93 N.M. 458, 601 P.2d 428, 431 (1979); State v. Foy, 224 Kan. 558, 582 P.2d 281, 288 (1978); Commonwealth v. Bastone, 466 Pa. 548, 353 A.2d 827, 830 (1976). Accordingly, this issue clearly does not warrant further review by this Court.

CONCLUSION

For the foregoing reasons, the State of Maryland prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of June, 1986, the Brief and Appendix in Opposition to Petition for Writ of Certiorari was mailed to the Court and copies thereof were mailed to George E. Burns, Jr. and Michael R. Braudes, Assistant Public Defenders, Second Floor, 312 North Eutaw Street, Baltimore, Maryland, 21201, Counsel for Petitioner.

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APPENDIX A

304 Md. 539, 574 (1985)

IN THE COURT OF APPEALS OF MARYLAND

NOS. 64 and 133

SEPTEMBER TERM, 1984

JOHN NORMAN HUFFINGTON

v.

STATE OF MARYLAND

Murphy, C.J.
Smith
Eldridge
Cole
Rodowsky
Couch
McAuliffe,

JJ.

Opinion by Smith, J.
Eldridge, Cole and McAuliffe, JJ., dissent

Filed: November 13, 1985

We shall affirm the conviction and sentence of John Norman Huffington in this, his third trip to this Court, the second after a death sentence. His first trip was reported in Huffington v. State, 295 Md. 1, 452 A.2d 1211 (1982), where we reversed and remanded for a new trial. Upon the remand after that reversal the case was removed to the Circuit Court for Frederick County for trial. In Huffington v. State, 302 Md. 184, 486 A.2d 200 (1985), we rejected his contention that to again try him would place him in double jeopardy. After our per curiam order in that case (but before the filing of the opinion) Huffington was tried in the Circuit Court for Frederick County. A jury convicted him of two counts of first degree murder, breaking and entering, and handgun offenses. The same jury sentenced him to death for each murder. The case reaches us under the provisions of Maryland Code (1957, 1982 Repl. Vol.) Art. 27, § 414 providing for automatic review by this Court whenever the death penalty is imposed.

The facts surrounding the incident leading to Huffington's conviction are fully set forth in our earlier opinion. We shall here set forth only such facts as are necessary to a clear understanding of each of the issues presented by

of Rassa's testimony at the Kanaras trial in Kent County. He sought its admission as prior evidence to establish that Kanaras might have killed the victims in the case at bar. The trial judge denied admission, stating:

> "The whole thrust of the cases in this area is that the right of cross-examination be fully afforded, and if it has not been afforded, then it is not only a violation of Article 21 of the Maryland Constitution but also before [sic] the amendment to the United States Constitution. It's clear from the proffered testimony in this case, and I find as a fact, that in the trial in which the Rassa transcript is sought to be used, Mr. Rassa was the State's witness, and accordingly, to grant your motion I would be depriving the State of its right to cross-examine fully Mr. Rassa in this case, which is a different case from the present case. The case in which the transcript is from, as I understand it, is the State v. Kanaras rather than the State v. Huffington, and so the situation is entirely different from the situation which caused me to grant the State's motion in connection with the Bognani testimony. Accordingly, the motion is denied."

There is no dispute here on the issue of Rassa's availability as a witness.

The rule applicable to prior testimony was set forth for the Court by Chief Judge Murphy in Crawford v. State, 282 Md. 210, 383 A.2d 1097 (1978):

> "Our predecessors have consistently held that testimony taken at a former trial may as a general rule be admitted at a subsequent trial where it is satisfactorily shown that the witness is unavailable to testify. Contee v. State, 229 Md. 486, 184 A.2d 823 (1962); Bryant v. State, 207 Md. 565, 115 A.2d 502 (1955); Hendrix v. State, 200 Md. 380, 90 A.2d 186 (1952). These cases generally recognize that where an opportunity was afforded to the accused to cross-examine the witness at the

> for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." 156 U.S. at 242-43, 15 S. Ct. at 339-40, 39 L. Ed. at 411.

On the issue in question see Annot., 15 A.L.R. 495 (1921), and the supplements thereto, 79 A.L.R. 1392 (1932), 122 A.L.R. 425 (1939), and 159 A.L.R. 1240 (1945). Obviously, as pointed out in 15 A.L.R. at 559, there can be no constitutional objection to admission of evidence on behalf of an accused in a criminal proceeding. The further observation is made that in admitting testimony on behalf of an accused courts generally have followed the rules which they have adopted with respect to permitting or rejecting testimony in favor of the prosecution.

On the problem at hand E. Cleary, McCormick's Handbook of the Law of Evidence, § 254 (3d ed. 1984) states:

> "Usually called 'former testimony', this evidence may be classified, depending upon the precise formulation of the rule against hearsay, as an

> important feature of the former-testimony exception is that which requires such testimony to have been given in a situation where an opportunity existed to utilize that truth-testing device. The former-testimony exception to the hearsay rule is unique in this respect, as no other exception makes cross-examination a requirement for admissibility, and it is not usually discussed in connection with evidence admitted under other exceptions. It was this opportunity to cross-examine which led Wigmore to characterize former testimony as unobjectionable under the hearsay rule, rather than as admissible as one of its exceptions. In order to ensure the reliability of former testimony, the proposed Federal Rules retain the requirement that the opponent be given the opportunity to develop the testimony by cross-examination." Id. at 553-54.

Professor Martin says, "[The] crucial question is whether, given that the opponent can not now cross-examine the witness, the examination on the prior occasion was fairly equivalent to cross-examination in the present situation." Id. at 556.

Fed. R. Evid. 804(b)(1) states:

> "(b) Hearsay exceptions.--The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony.--Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

'meaningful in the light of the circumstances which prevail when the former testimony is offered.'" Id. 804-74 to -76. (Emphasis in original.)

The case relied upon by the State that is closest to the factual situation before the Court is Commonwealth v. Meech, 380 Mass. 490, 403 N.E.2d 1174 (1980). There the defendant attempted to introduce at his trial testimony given by a witness for the prosecution before the grand jury. The court said:

"The common model for the exception is one where the prior testimony was given by a person, now unavailable, in a proceeding addressed to substantially the same issues as in the current proceeding, with reasonable opportunity and similar motivation on the prior occasion for cross-examination of the declarant by the party against whom the testimony is now being offered....

"The usual formula would not be fulfilled if grand jury testimony were subsequently offered against the indicted defendant, for he would not have had a chance to cross-examine. See United States v. Fiore, 443 F.2d 112, 115 & n. 3 (2d Cir. 1971), cert. denied, 410 U.S. 984 (1973). Nor is it nominally fulfilled where, as here, the defendant offers the testimony against the Commonwealth, for the Commonwealth was not in the position of a cross-examiner at the grand jury hearing; rather it was presenting the testimony through direct examination. However, it has been recommended by commentators, and on occasion held by courts, that a party's having tendered the testimony on direct should serve as the equivalent for the present purpose of his having cross-examined upon it. There is some support for this view as to grand jury testimony on the theory, perhaps, that the government should be considered bound to the trustworthiness of the evidence it chose to present to the grand jury as a basis for an accusation of crime. (See, however, note 12 infra.)

> did not know, in order to establish that Inglet was dealing with someone other than Robert Atkins, whose name was known to Inglet. Defense counsel for Atkins did not participate in the James hearing, and the hearing did not concern Atkins but only some of his codefendants. In addition, the government did not contend that Atkins was the Miami supplier being discussed by Inglet in the James hearing but rather that he was the contact man. Thus, the government did not have the motivation to question Inglet in order to make him acknowledge that the Robert of whom he spoke in the James hearing was in fact Atkins. Accordingly, Inglet's former testimony did not meet the requirements of 804(b)(1) for admission, and his challenge to its exclusion by the judge is without merit. See, e.g., Peterson v. United States, 344 F.2d 419, 425 (5th Cir. 1965)." 618 F.2d at 373.

We find Atkins persuasive. It follows along with the authorities we have heretofore quoted. When the State presented the testimony of Rassa at Kanaras' trial it was in a different context and for a different purpose from that for which Huffington desires to offer it in the case at bar.[2] The motivation on the part of the State for question-

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2. We take cognizance of the fact that the dissent differs with our view as to the purpose for which the Rassa testimony was offered at the trial of Kanaras. We point out that in Kanaras v. State, 54 Md. App. 568, 460 A.2d 61, cert. denied, 297 Md. 109 (1983), Judge Alpert said for the Court of Special Appeals:

> "In the instant appeal, the rebuttal testimony clearly explained and replied to the evidence which had been offered by the appellant in his defense. Kanaras had agreed to the accuracy of the language of the statement which he had given Saneman, which included the response that 'I never sold drugs. I always bought them.' Thus, the State was entitled to prove that Kanaras had been involved in drug transactions as a seller. Judge

Huffington is entitled as a matter of law to an instruction in his favor on this mitigating factor.

There is both a short and a somewhat longer answer to Huffington's contention. The short answer is that at no time did he request such an instruction. Not having requested such an instruction, the point is deemed waived. Maryland Rule 885.

A somewhat longer answer is that the sentencing authority, in this instance the jury, would be expected to return its finding based upon the evidence adduced before it. Evidence of Kanaras' conviction was not adduced. Had it been, the finding made by the jury at Kanaras' trial would not be binding upon the jury at Huffington's trial because it would not be based upon the same evidence.

The real answer is that contained in Evans v. State, Md. , A.2d (1985), [Nos. 66 and 98, September Term, 1984, decided Nov.12,1985] where Judge Eldridge said for the Court:

> "[W]e conclude that the General Assembly intended the words 'proximate cause' to apply only to direct physical causes of the victim's death, and not to acts of a principal in the second degree or an accessory before the fact which aided or abetted the act directly causing death." Md. at , A.2d at .

Footnote 16 of that opinion provides further clarification:

> "The type of situation which the Legislature likely had in mind by the language of § 413(g)(6) is illustrated by the following. If the perpetra-

Huffington contends that the trial court erred in admitting two portions of the presentence investigation report. The first concerns that portion of institutional history pertaining to infractions not leading to criminal prosecutions committed while Huffington was incarcerated prior to trial. The second pertains to the admission of Huffington's version of the facts pertaining to his activities at the times here pertinent.

For reasons to be hereafter developed we find Huffington's contentions to be without merit. There is another reason for overruling his contentions, however. The presentence investigation came in without objection. It is true that when the presentence investigation was being considered by the trial judge Huffington made specific objections to the portions of the report to which he now objects. However, the report was received in evidence without objection on behalf of Huffington. The record reflects:

> "Cassilly [Assistant State's Attorney]: Excuse me, Your Honor, could we ... now that we've finally gotten our presentence put together, can we distribute this to the Jury at this point?
>
> "Court: You'll want to put that in? Yes.
>
> "Cassilly: Yes, please.
>
> "Drew [for the defense]: I have no objection, Your Honor, if you want....
>
> "Court: All right, it will be received and may be distributed to the Jury. (St. Ex. 5

> habits, mental and moral propensities, social background and any other matters that a judge ought to have before him in determining the sentence that should be imposed. Skinker v. State, 239 Md. 234, 210 A.2d 716 (1965); Scott v. State, 238 Md. 265, 208 A.2d 575 (1965); Costello v. State, 237 Md. 464, 206 A.2d 812 (1965); Driver v. State, [201 Md. 25, 92 A.2d 570 (1952)]; Baker v. State, [3 Md. App. 251, 238 A.2d 561 (1968)]. The sentencing judge may, but need not, obtain a presentence report under Article 41, § 124 (b). Of course, the sentencing judge may take into consideration the defendant's conduct after the offense was committed, viz., he may consider evidence of events occurring after the date of the original sentencing to whatever extent he may deem necessary. North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed.2d 656 (1969); Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949); Purnell v. State, [241 Md. 582, 217 A.2d 298 (1966)]; Gatewood v. State, 15 Md. App. 450, 291 A.2d 688 (1972)." 267 Md. at 193-94, 297 A.2d at 706.

More recently in Logan v. State, 289 Md. 460, 425 A.2d 632 (1981), Judge Digges said for the Court:

> "In considering what is proper punishment, it is now well-settled in this State that a judge is not limited to reviewing past conduct whose occurrence has been judicially established, but may view 'reliable evidence of conduct which may be opprobrious although not criminal, as well as details and circumstances of criminal conduct for which the person has not been tried.' Henry v. State, 273 Md. 131, 147-48, 328 A.2d 293, 303 (1974)." 289 Md. at 481, 425 A.2d at 643.

We are not concerned here with crimes, as in Scott v. State, 297 Md. 235, 465 A.2d 1126 (1983), with which an accused was charged but had not yet been convicted. We believe that under our prior cases this institutional history was properly admissible.

> establish an alibi by attending a local 'fiddler's convention.' Kanaras remained with Appellant and refrained from informing anyone of the killings even after the disposal of the gun and knife used in the homicides because he remained 'scared' of Appellant."

The version obtained by the Parole and Probation agent as set forth in the presentence investigation report was as follows for the critical period:

> "About 1:45 a.m. the defendant and Kanaras left the Golden 40 and followed Hudson's car to an Edgewood 7-11 Store and then to Hudson's Motorhome. Diane Becker walked over to their car and asked them to wait until the people in the other car left. After the other vehicle left, the defendant and Kanaras entered the motorhome and all four (4) sat down. Hudson and the defendant discussed a future cocaine deal and Kanaras bought some cocaine from Hudson, after which Huffington and Kanaras left. They drove back to Huffington's apartment and both went inside. Kanaras allegedly wanted to party, but the defendant said he was tired and wanted to go to bed. Kanaras then left and the defendant went to sleep.
>
> "On 5/25/81 at about 9 a.m., Kanaras returned to Huffington's apartment and asked him to go partying. After showering, the defendant and Kanaras did some cocaine and drove around, heading toward the Fiddler's convention in Cecil County....
>
> "About 6:30 p.m. Kanaras called him asking him to cover for him, to tell anyone who asked, that they were at the Fiddler's Convention all night. The defendant claimed that at that time he did not know why Kanaras asked him to cover for him....
>
> "The defendant stated that he protected Kanaras with an alibi. He claimed that Kanaras never explained why he needed an alibi. The defendant denied participation in the crimes and denied his guilt to the charges. When asked if he had knowledge of or a hunch who committed the

We simply do not find Estelle or Huffington's Fifth Amendment rights applicable to the statement in the case at bar. We have set forth Huffington's version of the evidence and the statement in question at some length in order that there may be no misunderstandings. It is true that Huffington in his statement indicated that he had been in the company of Kanaras and of the victims, Diane Becker and Joseph Hudson. However, according to the statement given by Huffington, at the time when the alleged crimes were being committed he was home by himself and asleep. We find no infringement of Huffington's rights against self-incrimination.

iv. Victim participation

Code (1957, 1982 Repl. Vol.) Art. 27, § 413(g)(2) provides that a mitigating factor shall be that "[t]he victim was a participant in the defendant's conduct or consented to the act which caused the victim's death." Huffington contends that Hudson was a participant in the conduct leading to his death and hence Huffington was entitled as a matter of law to this mitigating factor.

Art. 27, § 413(g), enacted by Ch. 3 of the Acts of 1978, is modeled after § 210.6(4)(c) of the Model Penal Code. The latter states relevant to mitigating factors, "The victim was a participant in the defendant's homicidal

> "Ah, I parked the car, and where the car was parked it wasn't too much room on each side of the road, it was like a slight embankment on one side and an embankment on the other side, so two people really couldn't fit together coming out of the car, so I got out of the driver's side of the car and Joe Hudson got out of the passenger side of the car, and we met at the -- the back of the car, and John Huffington was right behind too, about three or four steps, and as we walked up to the house, that's when I heard these shots -- four or five shots rang out, and I saw Joe Hudson fall - fall to the ground to his -- on his side, and he rolled -- he rolled over ...."

This was the evidence before the jury. It does not make Hudson out as a participant in Huffington's conduct which caused Hudson's death. According to the testimony Hudson and Huffington were joint participants and co-conspirators in an alleged drug sale. The conduct which caused Hudson's death related to Huffington's carrying and concealing a loaded pistol and the firing of such pistol at Hudson's back. It is beyond the stretch of anyone's imagination to say that Hudson participated in this conduct.

We have recently stated, "It is the accused's burden to prove, by a preponderance of the evidence, the existence of a mitigating circumstance. [Section] 413(g); Tichnell v. State, 287 Md. 695, 730, 415 A.2d 830, 848-49 (1980)." Stebbing v. State, 299 Md. 331, 361, 473 A.2d 903, 918 (1984). In the case at bar Huffington failed to carry his burden concerning proof of the mitigating factor that Hudson participated in the acts causing his death. Moreover, the

> State's response to the defense's offer was some indication that the death penalty was not appropriate in this case. The State protested such action below and it is the State's position here on appeal that this procedure gave Appellant more than he was entitled to."

In Calhoun v. State, 297 Md. 563, 468 A.2d 45 (1983), the accused mounted an attack upon our death sentence statute based upon what he called the prosecutor's "unbridled exercise of discretion" under Art. 27, § 412(b). We considered Gregg and Furman and concluded:

> "Absent any specific evidence of indiscretion by prosecutors resulting in an irrational, inconsistent, or discriminatory application of the death penalty statute, Calhoun's claim cannot stand. To the extent that there is a difference in the practice of the various State's attorneys around the State, our proportionality review would be intended to assure that the death penalty is not imposed in a disproportionate manner." 297 Md. at 605, 468 A.2d at 64.

We do not regard consultation with the family of the victim here, after the State had already made a decision to seek the death penalty and after trial had begun, as any evidence of indiscretion by a prosecutor. We hold this contention to be without merit.

vi. The indictment

At Huffington's first trial a special verdict form was used. The jury convicted him of two felony murders and specifically acquitted him on charges that the two murders were premeditated. Huffington v. State, 302 Md. 184, 186,

rejected in Huffington v. State, 302 Md. 184, 486 A.2d 200 (1985).

In Williams v. State, 302 Md. 787, 490 A.2d 1277 (1985), Chief Judge Murphy recently said for the Court:

> "Under Maryland Rule 4-252(a) (formerly Rule 736a), a motion alleging a 'defect' in the charging document 'other than its failure to show jurisdiction in the court or its failure to charge an offense' must be filed within a designated time period prior to trial or the defect is waived.[2] The rule provides in subsection (c) that a motion 'asserting failure of the charging document to show jurisdiction in the court or to charge an offense may be raised and determined at any time.' A claim that a charging document fails to charge or characterize an offense is jurisdictional and may be raised, as here, for the first time on appeal. See Putnam [v. State, 234 Md. 537, 200 A.2d 59 (1964)]; Baker [v. State, 6 Md. App. 148, 250 A.2d 677 (1969)]; Maryland Rule 885. Where the claimed defect is not jurisdictional, it must be seasonably raised before the trial court or it is waived.
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> "2. For good cause shown, the rule permits the trial court to order otherwise." 302 Md. at 792, 490 A.2d at 1279-80.

To like effect see Hall v. State, 302 Md. 806, 809, 490 A.2d 1287, 1288 (1985). It follows, therefore, that any constitutional claim is waived because there was not a motion filed within the time limited by the rule.

The indictment was in the statutory form. Judge Cole recently said for the Court in Robinson v. State, 298 Md. 193, 202, 468 A.2d 328, 333 (1983), "[A]t least as a matter of state non-constitutional law, the legislatively enacted

98, September Term, 1984, decided November 12, 1985]; Colvin v. State, 299 Md. 88, 122-27, 472 A.2d 953, 970-72 (1984); Calhoun v. State, 297 Md. 563, 635-38, 468 A.2d 45, 80-81 (1983), and Tichnell, 287 Md. at 720-34, 415 A.2d at 843-50. We deem the matter to be settled.

viii. Multiple murders

Huffington contends that the State improperly used the death of more than one person as an aggravating factor while at the same time seeking two death sentences.

Code (1957, 1982 Repl. Vol.) Art. 27, § 413(d)(9) lists that "[t]he defendant committed more than one offense of murder in the first degree arising out of the same incident" as an aggravating circumstance which may be considered by the sentencing authority. Separate findings and sentencing determination forms were submitted to the jury pertaining to the death of each of the victims. In each instance the jury found that the defendant committed more than one offense of murder in the first degree arising out of the same incident. In each instance the jury also found as an aggravating factor that Huffington committed the murder while committing or attempting to commit robbery, arson, or rape or sexual offense in the first degree, a factor spelled out in Art. 27, § 413(d)(10).

Huffington argues:

> "(3) Whether the evidence supports the jury's or court's finding that the aggravating circumstances are not outweighed by mitigating circumstances; and
>
> "(4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

We do not find the death sentence here to have been imposed under the influence of passion, prejudice or any other arbitrary factor. We find that the evidence supports the jury's finding of statutory aggravating circumstances under § 413(d). We further find that the evidence supports the jury's finding that the aggravating circumstances are not outweighed by mitigating circumstances.

We turn to the proportionality review to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In Thomas v. State, 301 Md. 294, 483 A.2d 6 (1984), Chief Judge Murphy said for the Court:

> "The principles governing proportionality review of a death sentence in Maryland have been stated in a number of our cases. Stebbing v. State, 299 Md. 331, 473 A.2d 903 (1984); Colvin v. State, 299 Md. 88, 472 A.2d 953 (1984); Calhoun v. State, 297 Md. 563, 468 A.2d 45 (1983); Tichnell v. State, 297 Md. 432, 468 A.2d 1 (1983). The fundamental object of the statutorily mandated appellate review process is the avoidance of the arbitrary or capricious imposition of the death penalty by affording similar treatment to similar capital cases. Tichnell, 297 Md. at 466, 468 A.2d 1. The focus of § 414(e)(4) is upon capital cases

then stole drugs from Hudson's person. It further shows that Huffington then went to Hudson's mobile home and there murdered Diane Becker by striking her with a bottle and then stabbing her thirty-three times. He took money and drugs from the home before fleeing.

In Tichnell v. State, 297 Md. 432, 469, 468 A.2d 1, 20 (1983), we set forth the "relevant universe" to be considered by us in our proportionality review. In the process of our review in this case we have considered each of the reports submitted by trial judges under Maryland Rule 4-343. We have selected eight which we deem to be "similar" within the contemplation of Art. 27, § 414(e)(4).

Lawrence Johnson. Johnson was 17 years and 10 months old at the time of the commission of his crimes. According to the report of the trial judge he and his cousin entered a dwelling house through a basement window. Once inside they went up the basement steps to the first floor where they discovered the presence of the victim, who was 78 years old, small in stature, weighed but ninety pounds and was home alone. When their demands for money were not satisfied they grabbed her and shoved her into a spare bedroom. In the course of this episode the victim was brutally beaten with a broom handle, stomped on and kicked, tied, and strangled to death.

The trial judge, as the sentencing authority, concluded that the aggravating circumstances outweighed the mitigating circumstances and imposed the death penalty.

Willie Green. Green was 40 years of age when he and an accomplice murdered two employees of a restaurant in the course of a robbery. The victims were both stabbed to death. One victim had his hands tied behind him and his throat was slit. Two aggravating circumstances were found to exist, that Green committed more than one murder in the first degree arising out of the same incident and that the murders were committed during the commission of a robbery. Mitigating circumstances found were that the defendant was not the sole proximate cause of the deaths of the victims and that it was unlikely in view of his age that he would engage in further criminal activity. The trial judge was the sentencing authority. He found by a preponderance of the evidence that the mitigating factors outweighed the aggravating factors. Accordingly, life sentences were imposed.

Eugene Sherman Colvin. Colvin broke into a house. In the course of the crime he encountered the victim who was visiting in the home of her daughter. The victim was stabbed twenty-eight times about the throat. The weapon used was an eight-inch serrated knife taken from the kitchen of the home. About $10,000 in jewelry was removed from the

or an attempt to escape from or evade the lawful custody, arrest or detention of or by an officer or guard of a correctional institution or by a law enforcement officer, and (3) the defendant committed the murder while committing or attempting to commit robbery. The only mitigating circumstance found was set forth under "[o]ther mitigating circumstances." The jury stated:

> "This jury feels that a substantial mitigating factor is the defendant's background, which has been such that he has never been integrated into society. Therefore, he has been and is unable to conform with its norms and moral values."

The jury imposed a death sentence.

Curtis Wayne Monroe. Monroe is the same Monroe mentioned relative to James Arthur Calhoun. The incident is also the same. The report of the trial judge relative to the facts, states:

> "The police officer was pulled into a room, subdued, and shot in the head by Calhoun. At the same time, Monroe began firing a handgun, wounding the assistant manager, Douglas Cummins, and firing two shots into the alarm technician, David Myers, resulting in the death of Mr. Myers."

Monroe waived a jury and elected to have the sentencing procedure before the trial judge. As an aggravating circumstance it was found beyond a reasonable doubt that Monroe "committed the murder while committing or attempting to commit robbery, arson or rape or sexual offense in the first degree." The trial judge noted two mitigating circumstances.

range. A jury found Hughes guilty of first degree murder on the basis of the fact that it was a deliberate, willful and premeditated murder as well as a felony murder.

The jury found as an aggravating factor that the murder was committed while committing or attempting to commit a robbery. As a mitigating factor it found that Hughes had not previously been convicted of a crime of violence, etc. It also checked on the sentencing form that other mitigating circumstances existed. However, it listed no such circumstances. The jury returned a sentence of life imprisonment.

Brian Keith Quickley. Quickley and two others entered a furniture store in Harford County. An accomplice lured the victim to an area of the store isolated from the cash register. Quickley there shot the victim once between the eyes and again, as he was falling, in the back of the neck. The three individuals then left the store, taking television sets with them.

The jury found one aggravating circumstance, that the defendant committed the murder while committing or attempting to commit a robbery. It found two mitigating circumstances. The first was the youthful age of the defendant at the time of the crime. The second, under "[o]ther mitigating circumstances," was:

> "The defendant is at the borderline range of intelligence with severe intellectual limitations both at the verbal and performance measured

IN THE COURT OF APPEALS OF MARYLAND

Nos. 64 and 133

September Term, 1984

JOHN NORMAN HUFFINGTON

v.

STATE OF MARYLAND

Murphy, C.J.
Smith
Eldridge
Cole
Rodowsky
Couch
McAuliffe,

JJ.

Dissenting Opinion by McAuliffe, in which Eldridge and Cole, JJ. concur.

Filed: November 13, 1985

I cannot agree that the trial judge properly excluded a transcript of the testimony of Stephen Rassa. Rassa's testimony was critical to Huffington's defense, and Rassa could not be found. Huffington therefore offered a transcript of testimony given by Rassa as a State's witness in the prosecution of Deno Kanaras, but this evidence was rejected on the ground the State had no opportunity to cross-examine its own witness. The majority recognizes that direct-examination by the party against whom the testimony is offered may be sufficient to justify the admission of previous testimony, but affirms on the basis that the motives of the State at the time it offered the evidence differed significantly from those of Huffington when he offered it. A careful analysis of the facts will disclose, however, that Huffington and the State each wanted to develop precisely the same facts from Rassa, and that each did so for the purposes of impeaching Kanaras' credibility and discrediting his claim of duress. That the State's motive in the first case was to convict Kanaras by discrediting his testimony and its motive in the second case was to convict Huffington by relying on Kanaras' testimony is simply irrelevant. It is the identity of the motives of the two parties who offer the testimony that is material, and not the shifting motives of the State.

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The pivotal question, then, is whether the State had a motive similar to that of Huffington to develop the testimony of Rassa. This in turn requires a consideration of the issues intended to be addressed by the testimony in each case, and as indicated by the following advisory committee note to Fed. R. Evid. 804(b)(1) the question is whether there exists a "substantial" identity of issues.

> The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would not be done if the opportunity were presented. Modern decisions reduce the requirement to "substantial" identity. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable. (Citation omitted).

We look first at Huffington's motive in seeking to introduce the testimony of Rassa. It was clear from the State's evidence that only two persons in

Huffington would give him some additional cocaine for providing transportation, Kanaras said he drove Huffington back to the Hudson trailer, where Hudson joined them. He then drove, at the direction of Huffington, to a rural area in Harford County and stopped near a farmhouse. According to Kanaras, he was walking alongside Hudson toward the farmhouse to meet the prospective purchaser when Huffington fired five shots into Hudson. Kanaras said that Huffington then reloaded the pistol, rolled the body of Hudson over, and fired two more shots into Hudson's head at point-blank range. Kanaras admitted that the weapon used had once been owned by him, but claimed he had sold it to Huffington about five weeks earlier.

Kanaras said Huffington then pointed the gun at him and ordered him to drive back to the trailer. Once inside the trailer Kanaras was directed to search for Hudson's money. Following a successful search, Kanaras said Huffington struck the sleeping Diane Becker several times with a heavy bottle, and then repeatedly stabbed her with a knife Huffington produced from his boot. Kanaras testified he was then forced to accept a large amount of the money that had been stolen from Hudson, and to assist Huffington in destroying or disposing of evidence and attempting to establish an alibi. Kanaras denied he had been to Hudson's trailer during

> remember that as the car was coming to a stop he turned towards me and he reached underneath of my seat, and I said, "What are you doing", and he said, "I'm getting my gun." And I said, "Leave it there. Don't get your gun. I don't want any parts of anything like this." And I looked both ways outside of the car because I didn't want to be seen. I wasn't really sure what was going to happen at that time. . . .
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> I said, "Come on, Deno, let's go in.", and he said, he reached under the seat again, and I said again, "What are you doing?", and he said, "I'm just getting my gun. I just want to show it to you," And I said, "Deno, I don't need to see your gun. I've seen it before. Just leave it there." At that time I said to Deno "Is there something you're not telling me? Do you owe Joe money?" And there was no reply. I looked at him and I said, "Do you actually think that you could actually rob and shoot somebody in the middle of a crowded trailer park like this in daylight, and do you actually think you could shoot someone?" And there was no reply. Deno then - excuse me - I said to Deno - no, excuse me again - Deno said, "I have a knife in the glove compartment." And I said, "Are you crazy? Do you actually think you could stab someone with a knife?" He said, "No, but you could", referring to myself. And I told him I didn't want any parts of any of this."

On cross-examination Rassa said that on several occasions prior to May 20th he and Kanaras had discussed the possibility of robbing Hudson, and that he, rather than Kanaras, had initiated further discussion of the subject on that day.

Hudson, and that any assistance rendered thereafter was under duress. Following Kanaras' testimony, the State offered the testimony of four rebuttal witnesses. The proffered testimony of these witnesses was summarized by the Court of Special Appeals as follows:

> It was proffered that Stephen Rassa would testify that on May 20, 1981, shortly before purchasing cocaine from Hudson and Becker, Kanaras supposedly had to be dissuaded from robbing Hudson and stealing his cocaine. It was further proffered that Dale Saunders, Jr. would testify that Huffington and Kanaras came to "shake him down for money" due on a drug debt. Maryland State Trooper Gary Aschenbach, according to the State's proffer, would testify that while working undercover in early 1981, Kanaras had purchased drugs for him, had on one occasion carried a gun in anticipation of a large drug deal, and had expressed interest in an illegal scheme to destroy a boat for money. The testimony of Thomas Wagner, according to the State, would show that Kanaras had shown him what was to be the murder weapon. Kanaras v. State, supra, 54 Md.App. at 589.

Expressing some uncertainty that all the evidence proffered by the State was properly offered as rebuttal, the trial judge allowed the State to reopen its case, and thus Rassa's testimony became a part of the State's case in chief.

The majority states that "the purport of Rassa's testimony was that a few days before the incident in question Kanaras was still involved with drugs" and that this evidence was offered in rebuttal to Kanaras' earlier testimony that he

> drug transactions, and may have specifically considered robbing Hudson. The additional State's evidence supplied a motive for the crimes and supplied evidence of advance preparation for the crimes. As such, it was admissible to show an independent intent and motive to commit the crimes.
> Kanaras v. State, supra, 54 Md.App. at 595.

The importance of Rassa's testimony to assist the trier of fact in assessing the credibility of Kanaras is perhaps best illustrated by the argument of the State's Attorney in support of the State's motion to have Kanaras called as a court's witness.[2]

> The following reasons, I'm going to basically go through a skeleton sketch of what he would testify and and why we don't believe we can believe him. His first indication would be that the first time that he had heard this particular incident or that this came about that he was aware that anybody was going to rob Joseph Hudson and Diane Becker was that night that it actually occurred--first of all, a witness tes--has testified, a State's witness has testified in a prior trial that Kanaras had discussed with him and tried to get him to rob Hudson sometime prior to this, and therefore we believe--it is the State's contention that we believe--what we believe is that Kanaras wanted to rob Hudson, didn't have the whatever to do it by himself, and continued looking for someone to help him with this robbery after that contact with that particular individual, and that he was

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[2] This motion was denied, and Kanaras was called as a State's witness.

SUPREME COURT OF THE UNITED STATES

JOHN NORMAN HUFFINGTON

v.

MARYLAND

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

No. 85–6648. Decided July 7, 1986

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting in this case and in No. 85–6649, *Evans* v. *Maryland*, cert. denied June 30, 1986, and No. 85–6650, *Foster* v. *Maryland*, cert. denied June 30, 1986.

Petitioners were sentenced to death pursuant to a procedural scheme that they strenuously contend is unconstitutional. The Maryland Court of Appeals, through a highly creative reading of Maryland law and a heavy dose of procedural technicality, managed to affirm petitioners' sentences without reaching their constitutional claim. I consider such evasion repugnant, and I dissent from the Court's denial of certiorari.

The dispute in this case rests on Md. Ann. Code, Art. 27, § 413(h). That section, designed to guide the deliberations of the sentencing jury in capital cases, provides:

> "(1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.

> "(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.
>
> "(3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life."

The language of that provision is clear: death shall be imposed *whenever* mitigating circumstances do not outweigh aggravating circumstances. It follows that death must be imposed when mitigating and aggravating circumstances are in equipoise. Put another way, death must be imposed *unless* mitigating circumstances outweigh aggravating circumstances: the burden of proof on the question of whether mitigating circumstances outweigh aggravating circumstances is on the defendant.

This understanding of the statute is confirmed by Maryland Rule 4–343, a recodification of Md. Rules Proc. 772A (superseded), which prescribes the verdict sheet used in Maryland capital sentencing proceedings. In Section I of that verdict sheet, the jury lists the aggravating circumstances it has found. In Section II, it lists the mitigating circumstances it has found. In Section III, it is instructed to answer "yes" or "no" to the following statement: "Based on the evidence, we unanimously find that it has been proven by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked "yes" in Section II outweigh the aggravating circumstances marked "yes" in Section I." The jury is further instructed that if Section III is marked "no," it must enter a sentence of death. This rule, enacted contemporaneously with § 413, effectuates the plain language of the statute—the jury must return a sentence of death unless the defendant affirmatively proves that mitigating outweigh aggravating circumstances.

Despite the apparent clarity of the statutory language and the verdict sheet, the Maryland Court of Appeals, in *Tichnell*

v. *State*, 287 Md. 695, 730, 415 A. 2d 830, 848–849 (1980), appeared to read the statute differently. It stated:

> "Section 413 does not explicitly specify which party has the burden of producing evidence and the burden of persuasion. . . . [I]f the sentencing authority finds, by a preponderance of the evidence, that the mitigating circumstances do not outweigh the aggravating circumstances, the death penalty must be imposed. § 413(h)(2). Because the State is attempting to establish that the imposition of the death penalty is an appropriate sentence, the statute places the risk of nonpersuasion on the prosecution with respect to whether the aggravating factors outweigh the mitigating factors."

The court did not attempt to reconcile this reading with the language of § 413(h), or indeed with the court rule it had approved two years earlier.

Pronouncements of the Maryland Court of Appeals in cases subsequent to *Tichnell* were conflicting. The Maryland courts continued to agree that the the rule established by that court as Md. Rules Proc. 772A and Rule 4–343, instructing the jury that it must return a sentence of death if mitigating circumstances do not outweigh aggravating, was valid under the Court of Appeals' decisions. Capital defendants, in case after case, continued unsuccessfully to challenge § 413(h) as unconstitutionally allocating that burden. See *Stebbing* v. *Maryland*, —— U. S. —— (1984) (MARSHALL, J., dissenting from denial of certiorari) (Court should review constitutionality of § 413(h) because it appears to place burden on defendant); *Foster* v. *State*, 304 Md. 439, 471, 499 A. 2d 1236, 1253 (1985) (argument that Maryland capital punishment statute places improper burden on defendants at sentencing phase "made in virtually all death sentence appeals in this court"). The Maryland Court of Appeals did not return to the point directly, except occasionally to refer back to *Tichnell* or to quote or paraphrase the language of the statute. *E. g.*, *Johnson* v. *State*, 303 Md. 487, 537, 495 A. 2d 1

(1985), cert. denied, —— U. S. —— (1986); *Trimble* v. *State*, 300 Md. 387, 415, n. 16, 478 A. 2d 1143, 1157, n. 16 (1984), cert. denied, —— U. S. —— (1985); *Johnson* v. *State*, 292 Md. 405, 438, 439 A. 2d 542 (1982). The jury instruction required by Rules 772A and 4–343 continued in use.

In this case, petitioners were convicted of murder and sentenced to death. At the trial and appellate levels, they strenuously challenged the burdens established by Maryland law, attacking § 413 "as implemented by Md. Rule 772A" as placing the burden on the capital defendant to convince the sentencer that mitigating circumstances outweigh aggravating circumstances. See *Evans* v. *State*, 304 Md. 487, 554, 499 A. 2d 1261, 1296 (McAuliffe, J., concurring and dissenting) (quoting petitioner Evans' appellate brief).

The Maryland Court of Appeals rejected petitioners' challenge. Their attack, it explained, reflected a misunderstanding of *Tichnell* and of Maryland law. The language of the Maryland statute, the court stated, in fact did not speak to the "case where the sentencing authority found the aggravating and mitigating circumstances to be evenly balanced or was unable to determine which outweighed the other." *Foster*, *supra*, at 478–479, 499 A. 2d, at 1256. The burden of proof in such cases, the court definitively stated, was on the prosecution.

One might think that this ruling would have been cause for celebration by petitioners. Petitioners were condemned to death pursuant to instructions that had put the burden of proof on them at a key point in the sentencing proceeding. They had strenuously challenged that scheme both at the trial and appellate levels. And the Maryland Court of Appeals had just held that state law would not permit such an imposition of the burden. One might forgive petitioners for believing that they were therefore due to receive new sentencing proceedings. The Maryland Court of Appeals, however, disagreed.

The Maryland Court of Appeals did not contest that petitioners had challenged the constitutionality of the *statute* at length both at the trial and appellate levels. It held, however, that petitioners had committed a fatal error in drafting their appellate briefs. They had limited their challenge to the statute, and had neglected explicitly to challenge the state-prescribed instructions and verdict sheet, which tracked the statutory language. Since the statute as interpreted was constitutional, the court reasoned, and petitioners had preserved no other challenges, there was no cause for reversal. The court noted that counsel for at least one petitioner had expressly objected at trial when the trial judge, instructing the jury on the weighing of aggravating and mitigating circumstances, used the language of § 413(h). Even were the issue not waived on appeal, the court ruled, there was no error, because the language of § 413(h) itself "does not place any burden . . . upon the accused." *Foster* v. *State*, 305 Md. 306, ——, 503 A. 2d 1326, 1332 (1986).

I find this result unconscionable. I have long believed that the Maryland statute, as written, unconstitutionally places the burden of proof on capital defendants at the sentencing phase of their trials. See *Stebbing* v. *Maryland*, *supra*. I am gratified that the Maryland Court of Appeals has read that burden of proof out of the statute. But I am wholly unconvinced by the reasoning that that court used to avoid extending the benefits of its decision to petitioners.

First, it is plain that any rational juror would understand the language of § 413(h) and Rule 4–343 as placing the burden of persuasion on the accused. Indeed, I cannot imagine any other way to read the statute that does not completely ignore its words. No fair-minded juror could have understood from these instructions that the burden was upon the State to prove by a preponderance of the evidence that aggravating circumstances must outweigh mitigating circumstances before a sentence of death could be returned. "It is distressing to accept a judicial construction that black is white; it is folly

to suggest that jurors will arrive at the same conclusion." *Evans, supra*, at 558, 499 A. 2d, at 1298 (McAuliffe, J., concurring and dissenting).

The Court of Appeals' resolution of the waiver issue, further, allowed it to frustrate key federal rights only by means of technicality worthy of seventeenth-century pleading. Once petitioners attacked the burden of proof imposed by the language of the statute, their failure explicitly to argue that instructions precisely tracking the language of the statute were similarly flawed was, to say the least, understandable. Reasonably prudent counsel could have assumed that if the Court of Appeals had found that the language of the statute impermissibly imposed the ultimate burden on defendants, it would have similarly disapproved instructions to the same effect. Only the court's "interpretation" of § 413(h) to obviate the constitutional claim created petitioners' dilemma. The court stated that it was merely reaffirming what had been the law since *Tichnell;* yet, as the dissenting judge below remarked,

> "[t]he frequency with which defense counsel have argued since *Tichnell I* that the statute improperly places the burden of ultimate persuasion upon the defendant, and the failure of experienced and able defense counsel to argue for an instruction to the opposite effect upon the authority of *Tichnell I* suggests to me that the 'interpretation' announced [in this case] must be ranked among the best kept secrets in this State." *Evans, supra*, at 556, n. 5, 499 A. 2d, at 1297, n. 5 (McAuliffe, J., concurring and dissenting).

I do not complain about the fact that the Maryland Court of Appeals has chosen to correct the error of the Maryland legislature in drafting § 413. Its decision to deny petitioners the benefit of that change, however, epitomizes the arbitrary and capricious administration of the death penalty in this Nation. I would grant the petitions for certiorari.